Supreme Court, U.S.
FILED

No. (1)

05 1459 MAY 15 2006

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In The
Supreme Court of the United States

In Re: BETTY I. FRENCH,

Debtor.

RANDY LEE FRENCH;
DONNA MARIE SHAKA,

Petitioners,

v.

GEORGE W. LIEBMANN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

Did the United States Court of Appeals for the Fourth Circuit err in holding that 11 U.S.C. § 548 could be applied extraterritorially so as to avoid a transfer of real estate situated in the Commonwealth of the Bahamas, in light of the historical precedent against the exercise of jurisdiction in that manner and in light of the presumption that United States Statutes must receive domestic application only in the absence of clear evidence of Congressional intent to the contrary; and did the Fourth Circuit err in finding Congressional intent to apply § 548 extraterritorially?

Did the United States Court of Appeals err in its consideration of the Petitioners' request that the Court refrain from exercising jurisdiction to avoid a transfer of real estate situate in the Commonwealth of the Bahamas under the doctrine of international comity where the transfer could not have been avoided under Bahamian law, where a Bahamian court is unlikely to give effect to the judgment of a United States court on the issue of avoiding the transfer, and where a Bahamian court would have applied the law of the situs jurisdiction to decide all such issues?

CORPORATE DISCLOSURE STATEMENT WITH RESPECT TO THE PETITIONERS

Petitioners are individuals; therefore no corporate disclosure is necessary.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT WITH RESPECT TO THE PETITIONERS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 10

A. A Case of First Impression is Presented, yet many Prior Decisions of this Court Point the Way, and the Court of Appeals has Departed from Them, thus Working a Major Change in the Law Concerning Extraterritorial Exercise of Jurisdiction 10

B. The Decision of the Court of Appeals Misapplied, or Failed to Apply, the Standards for the Analysis of Extraterritoriality Mandated by Numerous Decisions of this Court 13

C. The Court of Appeals Misapplied the Standards for Analysis of the Question of International Comity by Failing to Give Due Weight to the Law of the Situs and By an Inappropriate Restriction on Application of the Doctrine 22

CONCLUSION 29

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 109 S. Ct. 683, 102 L. Ed. 2d. 818 (1989).....18

Clarke v. Clarke, 178 U.S. 186, 20 S. Ct. 873, 44 L. Ed. 1028 (1900).....12, 14, 22

Duke v. Andler, [1932] 4 D.L.R. 529 (Supreme Court of Canada, 1932).....24, 27

Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528 (D.C. Cir. 1993).....6

Equal Opportunity Commission v. Arabian American Oil Co., 499 U.S. 244, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991).....22

Fall v. Eastin, 215 U.S. 1, 30 S. Ct. 3, 54 L. Ed. 65 (1909).....12, 14, 19, 22

Foley Bros., Inc. v. Filardo, 336 U.S. 218, 69 S. Ct. 575, 93 L. Ed. 680, 683 (1949).....22

Galbraith v. Grimshaw, [1910] A.C. 508, App. 96 (House of Lords, 1910).....28

Hartford Fire Insurance v. California,
509 U.S. 764 (1993) 9, 22, 23, 26

Hilton v. Guyot,
159 U.S. 113, 40 L. Ed. 95,
16 S. Ct. 139 (1895) 26

Hong Kong and Shanghai Banking Corp, Ltd. v. Simon (In re Simon),
153. F.3d 991 (9th Cir. 1990) 5, 7, 20

In re Maxwell Communications Corp.,
170 B.R. 800 (Bkrtcy. S.D. N.Y. 1994)
("Maxwell I"), *affirmed*,
186 B.R. 807 (S.D. N.Y. 1995)
("Maxwell II"), *affirmed*,
93 F.3d 1036 (2d Cir. 1996) 10, 11, 15

Lujan v. Defenders of Wildlife,
504 U.S. 555, 112 S. Ct. 2130,
119 L. Ed. 2d 351 (1992) 18

Nakash v. Zur (In re Nakash),
190 B.R. 763 (Bkrtcy. S.D. N.Y. 1996) 20

Oakey v. Bennett,
52 U.S. 33, 13 L. Ed. 593 (1851) 11, 14, 19, 22

Sale v. Haitian Centers Council, Inc.,
509 U.S. 155, 113 S. Ct. 2549,
125 L. Ed. 2d. 128 (1993) 15

Smith v. United States,
507 U.S. 197, 113 S. Ct. 1178,
122 L. Ed. 2d. 548 (1993) 15

Stewart Estate v. Cartwright,
[2001] BHS J No. 60 1999 No. 1375
(Bahamas Supreme Court, Equity Side, 2001)....27

United States v. Crosby,
7 Cranch 115 (1812) 12

STATUTES

11 U.S.C. § 541....*passim*

11 U.S.C. § 544....2, 19, 28

11 U.S.C. § 547....2, 11, 15, 18

11 U.S.C. § 547(b)....17

11 U.S.C. § 548....*passim*

11 U.S.C. § 548(d)(1)....4

11 U.S.C. § 550....2, 4, 14, 21

28 U.S.C. § 1254(1)....2

28 U.S.C. § 1334(e)....*passim*

Bahamian Records and Regulations Act, 1928 § 175....2

Chapter 175 of the Statute Law of the Bahamas,
Records and Regulations Act....2

Bahamian Fraudulent Dispositions Act 1991....2, 27

OTHER AUTHORITIES

David M. Green and Walter Benzija, *Spanning the Globe: The Intended Reach of the Bankruptcy Code,* 10 Am.Bankr.Inst.L.Rev. 85 (Spring 2002) 15

Dicey and Morris, *The Conflict of Laws (2nd Ed. 1987)* 13

Odgers, *The Construction of Deeds and Statutes (3d Ed. 1951)* 27
Restatement (Second), Conflicts of Laws, § 223 ....9, 23, 24

Restatement (Third) of the Foreign Relations Law of the United States § 403 9

Restatement (Third) of the Foreign RelationsLaw of the United States, Section 403(1) 23

Randy L. French and Donna Marie Shaka respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceedings on February 14, 2006.

OPINIONS BELOW

1. The Opinion of the United States Court of Appeals for the Fourth Circuit dated February 14, 2006, as amended on February 16, 2006, is reported at 440 F.3d 145 (4th Cir. 2006). The Orders entered in conjunction with this opinion, dated February 14, 2006, and February 16, 2006, are reproduced at App. 70 and App. 1, *infra,* respectively.

2. The Opinion of the United States District Court for the District of Maryland dated December 8, 2004, is reported at 320 B.R. 78 (D. Md. 2004) and is reproduced at App. 20, *infra*; the Order entered December 8, 2004, in conjunction with this Opinion, is reproduced at App. 19, *infra.*

3. The Opinion of the United States Bankruptcy Court for the District of Maryland denying Appellants' motion to dismiss, dated October 8, 2003, is reported at 303 B.R. 774 (Bkrtcy. D. Md. 2003) and is reproduced at App. 47, *infra*; the Order entered in conjunction with this Opinion, also dated October 8, 2003, is reproduced at App. 45, *infra.*

4. The Memorandum Opinion of the United States Bankruptcy Court for the District of Maryland granting summary judgment dated April 21, 2004, is unreported and reproduced at App. 37 *infra*; the Order entered in conjunction with this Opinion, also dated April 21, 2004, is reproduced at App.35, *infra.*

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case primarily concerns a clash between the law of the United States and that of a friendly nation, the Commonwealth of the Bahamas, as a result of the extraterritorial application of Section 548 of the Bankruptcy Code (11 U.S.C. § 548) to avoid and thus invalidate a transfer of real estate located in the Bahamas which was not defeasible under Bahamian law. The pertinent portions of this statute are reproduced at App. 74, *infra.*

Other related portions of the Bankruptcy Code involved with this case include 11 U.S.C. § 541, pertinent portions of which are reproduced at App. 71, *infra;* 11 U.S.C. § 544, an extract of which is reproduced at App. 72, *infra*; 11 U.S.C. § 547, an extract of which is reproduced at App. 73, *infra;* and 11 U.S.C. § 550, an extract of which is reproduced at App. 75, *infra.* This case also involves the exercise of bankruptcy court jurisdiction, which in part is provided for in 28 U.S.C. § 1334(e), which is reproduced at App. 77, *infra.*

Finally, also involved with this case are two Bahamian statutes. The Fraudulent Dispositions Act 1991, which governs actions to set aside a fraudulent transfer, is reproduced at App. 109, *infra.* Chapter 175 of the Statute Law of the Bahamas, the Registration of Records Act, is concerned with the recordation of deeds to real property in the Bahamas and, in pertinent part, is reproduced in App. 112, *infra.*

STATEMENT OF THE CASE

The facts of the case were as stated in the opinion of the Court of Appeals. In 1976, Betty Irene French, a Maryland resident, purchased a residence in Nassau, Bahamas. Subsequently, she gave that residence to her two children, the Petitioners Randy Lee French and Donna Marie Shaka. The conveyance was effectuated by a deed of gift and by an indenture, prepared according to Bahamian law, which was attested to and was then delivered to Randy and Donna at a Christmas party held in Maryland on December 25, 1981.

The owner of the property previous to Betty French, a Bahamian senator, advised Randy and Donna not to record the deed; under Bahamian law, he told them, the conveyance was final and complete upon delivery of the deed; and he further advised them that, because of high transfer taxes which were charged upon recordation, deeds commonly were not recorded. Following this advice, Randy and Donna did not record the deed at once but simply retained it in their possession for several years.

In the late 1990's, Betty French and her husband, Elwood Dean French, found themselves in serious financial trouble. Concerned over the possibility that the property might somehow become involved, Randy and Donna decided to record the deed. They retained a Bahamian attorney to handle the recordation and paid the necessary taxes and fees; and the deed was then recorded with the Office of the Registrar in the Bahamas on June 21, 2000.

The senior Frenches' financial difficulties came to a head with the filing of a voluntary Chapter 7 petition by Elwood French in September 2000. This was soon followed by the filing of an involuntary petition against

Betty French in October 2000; and an order for relief was entered against Mrs. French on January 29, 2001.

On August 22, 2002, Mrs. French's bankruptcy trustee, George Liebmann, filed an adversary proceeding seeking to avoid the transfer of the Bahamas property under § 548 of the Bankruptcy Code and seeking to recover the property or its value from the Petitioners for the benefit of the Chapter 7 estate under § 550. In pertinent part, the complaint alleged that Appellants were the recipients of a constructively fraudulent transfer of the debtor's property, made without fair consideration at a time when the debtor was insolvent, within the year prior to the petition date.[1] The complaint alleged that the date of recordation of the deed should be deemed to be the date of the transfer under Section 548(d)(1) because it was only at that time that the transfer became so far perfected, under local law, that the transferees (Petitioners) acquired rights superior to any competing purchaser.[2]

The parties were in agreement as to the material facts of the case. It was acknowledged that there had been no consideration for the transfer and that Mrs. French had been insolvent at the time the deed was recorded. However, Petitioners moved to dismiss the complaint on two grounds. First, Petitioners argued that

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[1] The Complaint also contained allegations of intentional fraud, but these were never ruled on by the Bankruptcy Court because of the finding on summary judgment that the transfer was constructively fraudulent.

[2] The Opinion of the Court of Appeals asserts that the parties were in agreement on this point. This assertion was not entirely correct. Appellants took the position that the Registration of Records Act is not a "perfection" statute and that the transfer was perfected at the time of delivery of the deed. However, it was acknowledged that the acquisition of unassailable rights occurred at the time the deed was recorded.

the application of Section 548 to invalidate a transfer of real estate in the Bahamas was an improper extraterritorial application of the statute. Secondly, relying on the doctrine of international comity, Petitioners argued that the application of § 548 was inappropriate, particularly in these circumstances, and that the Bankruptcy Court should decline to exercise jurisdiction to invalidate a real estate transfer which could not have been invalidated under the law of the *situs* country. In so doing, they took the position that the law of the *situs* was the only appropriate law for the invalidation of a real estate transfer and that the exercise of jurisdiction for this purpose by a foreign sovereign was improper.

The Bankruptcy Court disagreed, holding that § 548 could properly be applied to this transaction and further, that the Court should not refrain from exercising jurisdiction on the basis of international comity. The motion to dismiss was therefore denied. App. 46, 48.

The first of these holdings rested primarily on the belief that this property, which was not property of the debtor at the time Betty French's bankruptcy case was filed, was nevertheless property of the estate and thus subject to the exercise of *in rem* jurisdiction by the Bankruptcy Court. The principal authority cited in support of the holding was *Hong Kong and Shanghai Banking Corp, Ltd. v. Simon (In re Simon),* 153. F.3d 991 (9th Cir. 1990), one of a small group of cases in which it has been held that the exercise of jurisdiction to protect property of the estate does not involve extraterritoriality because such property is *in custodia legis* and thus, constructively at least, within the United States. As such, the Bankruptcy Court held, extraterritoriality was not an issue. The Bankruptcy Court further noted that there were a number of other situations in which various sections of the Code (other than § 548) had been applied

extraterritorially; and it found evidence of Congressional intent to exercise § 548 extraterritorially in the grant of worldwide jurisdiction over the debtor's property and property of the estate, citing 28 U.S.C. § 1334(e). Finally, as an additional basis for its holding on extraterritoriality, the Bankruptcy Court found that creditors would suffer harm if Section 548 could not be used to invalidate the transfer; and, therefore, that the matter fell within an alleged exception to the presumption against extraterritoriality, with reference to *Environmental Defense Fund, Inc. v. Massey,* 986 F.2d 528 (D.C. Cir. 1993).

The Bankruptcy Court also held that it would be improper to refuse to exercise jurisdiction based on considerations of international comity. First, the Bankruptcy Court noted that there was no competing proceeding to which it might defer; and secondly, the Court clearly felt that the most important factor in the analysis was the citizenship of the transferor and transferees, all of which were U.S. citizens over whom the Court had personal jurisdiction.

With the Bankruptcy Court having thus disposed of the questions of extraterritoriality and international comity, the Trustee moved for summary judgment, which the Bankruptcy Court granted after a brief hearing; cf. App. 35 and 37.

Petitioners appealed that judgment to the District Court, which then affirmed the Bankruptcy Court, including its refusal to dismiss the case, but on somewhat different grounds. The District Court suggested (without expressly holding) that the Bankruptcy Court was incorrect in ruling that the property was property of the bankruptcy estate, noting that this conclusion was contrary to the substantial weight of authority (including one of the Bankruptcy Judge's own opinions). App. 31. In

light of this, the issue of extraterritoriality could not be sidestepped by the device of a supposed exercise of worldwide *in rem* jurisdiction or a finding that the property in question was constructively within the United States, as the Ninth Circuit had done in *Simon*. The District Court thus resolved to take a "heads on" approach to the question, to search for evidence of Congressional intent, as this Court has mandated in its many opinions on the issue of the presumption against extraterritoriality. Having reached this point, however, the District Court was unable to find any actual evidence of intent one way or the other, other than the fact that, in its view, § 548 was an important cog in the great wheel of the Bankruptcy Code. On this factor alone, the District Court held that there was sufficient evidence of Congressional intent that § 548 should be applied extraterritorially because such a holding would make the section more effective. The decision was crafted to reach a result, the Court believing that a refusal to apply § 548 extraterritorially would amount to a license to wrongdoers to hide property from the estate and thus deliberately defraud creditors; even though, in the case at bar, the gift of property was entirely innocent.

In ruling on the question of international comity, the District Court gave great weight to the citizenship of the parties and to the fact that much of the conduct related to the transfer had occurred in the United States. Like the Bankruptcy Court, the District Court stated its belief that the exercise of international comity came into play only where there was a competing foreign proceeding to which the U.S. Court could defer. Giving little or no weight to the law of the situs, the District Court found that the contacts with the United States were so strong that there was no reason to refrain from exercising jurisdiction. App. 34.

The Petitioners appealed this decision to the Court of Appeals, which affirmed the judgment of the District Court, but once again relied on different grounds, at least insofar as the issue of extraterritoriality was concerned. Indeed, the Court of Appeals in its opinion touched on some of the issues that had been decided by the Bankruptcy Court and the District Court but then found that the questions decided there did not require a further decision. With respect to the question of property of the estate, on which Judge Schneider had primarily based his decision on extraterritoriality, the Fourth Circuit merely noted what it perceived to be a split of opinion among the courts which had considered the question. After some extended consideration of whether or not this case did in fact involve the extraterritorial application of Section 548, the Court of Appeals ultimately decided that this question also did not require a decision. Instead, much in the manner of the District Court, the Fourth Circuit held that the presumption against extraterritoriality was overcome, but once again with no citation to any direct or even inferential evidence of Congressional intent other than the perception that the extraterritorial application of Section 548 fit within the overall scheme of recovering avoidable transfers, a desirable goal from the point of view of creditors. Unlike the District Court, however, the Fourth Circuit placed primary reliance on an analysis of the language of § 548. Observing that § 548, which it said was linked to the definition of estate property in § 541, the Court of Appeals noted that § 548 was intended to permit the avoidance of transfers of property that *would have been* property of the estate if the transfer had not taken place, and it then concluded from this, but with no other evidence, that Congress had "made manifest its intent that § 548 apply to all property that, absent a prepetition transfer, would have been property of the estate, *wherever that property is located.*" App. 11 (emphasis added). The Court of Appeals also stated that, under the statutory scheme, creditors are "entitled to the

'interests of the debtor' in property" under § 541 and that "they may avoid a debtor's fraudulent transfer of the same 'interest[s] of the debtor in property' under Section 548." Thus, the Fourth Circuit concluded that Congress intended to provide for the avoidance of property in a foreign country and that the "evidence" of intent was sufficient to overcome the presumption.

On the question of international comity, the Fourth Circuit, like the lower courts, saw no competing proceeding to which a U.S. court might defer, thus apparently adopting the notion that the existence of such a proceeding is a *sine qua non* for application of the doctrine. The opinion concluded that, absent a competing proceeding, there was no way in which U.S. law and Bahamian law would clash. App. 15. But the Court nevertheless undertook an analysis of the factors which should be taken into account where international comity is an issue. Basing its analysis on the factors mentioned in Restatement (Third) of Foreign Relations Law of the United States § 403 and Justice Scalia's dissenting opinion in *Hartford Fire Insurance v. California,* 509 U.S. 764 (1993), the Court of Appeals concluded that other factors present in this case outweighed the usual rule that the law of the situs is applied in questions concerning title to real property.

In analyzing the problem, the Fourth Circuit did not view the application of the situs rule as mandatory "when a case involves the definition of property interests," and instead it adopted an approach which it believed was suggested by the Restatement (Second) of Conflict of Laws ch. 9, topic 2, introductory note, to the effect that the situs law might not govern in a case involving "the allocation of interests in land [between]...debtor and creditor" if "regulation of the relationship is of greater concern to a state other than the situs." This, the Court of Appeals said, is particularly

true when the land in question is part of an "aggregate." App. 14. Finding that the United States had a greater interest "in regulating this transaction" than the Bahamas, and finding that the property was part of an "aggregate," i.e., the bankruptcy estate, the Court of Appeals rejected the application of international comity to this case.

On these grounds, the Fourth Circuit affirmed the decision of the District Court.

REASONS FOR GRANTING THE PETITION

A. A Case of First Impression is Presented, yet many Prior Decisions of this Court Point the Way, and the Court of Appeals has Departed from Them, thus Working a Major Change in the Law Concerning Extraterritorial Exercise of Jurisdiction.

The specific issues raised in this case have never been decided with respect to § 548 of the Bankruptcy Code in any previous reported case, issues of great importance not only to these litigants but to the country.[3] In fact, the only reported case dealing with the extraterritorial application of a bankruptcy trustee's avoidance powers under the Code is *In re Maxwell Communications Corp.*, 170 B.R. 800 (Bkrtcy. S.D. N.Y. 1994)("Maxwell I"), *affirmed* 186 B.R. 807 (S.D. N.Y. 1995)("Maxwell II"), *affirmed* 93 F.3d 1036 (2d Cir. 1996)(affirmance only on the basis of international comity). The facts and issues presented in *Maxwell*

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[3] This point is underscored by the fact that every decision on the merits of the issues raised herein has been published by the issuing court.

Communications were significantly different from those of this case and so, unfortunately, those decisions offer only limited guidance.[4]

The prior decisions of this Court, however, do point the way. Some 155 years ago, in *Oakey v. Bennett,* 52 U.S. 33, 13 L. Ed. 593 (1851), this Court declared that the use of a United States bankruptcy statute to invalidate the title to real property in a foreign country – Texas, during the time in question – was an "extraterritorial" action forbidden by the longstanding rule that the one sovereignty could not "regulate the conveyance of real estate in a foreign government" and, in doing so, stated that "[t] here is no pretence that this government, through the agency of a bankruptcy law, could subject the real property in Texas, or in any other foreign government, to the payment of debts."

Manifestly, though the precise methods may have varied as new bankruptcy statutes were enacted, the interest of the United States in adjusting the affairs of creditors and debtors is much the same as it was in 1851. A comprehensive national bankruptcy act had been passed just 10 years before *Oakey* in recognition of the importance of that interest. Yet, in the face of such an interest, it was understood that bankruptcy jurisdiction was not without limit. Now, in this case, the Court of Appeals has said that § 548 can be utilized to do the very thing this Court said could not be done. The idea that such a thing is even possible has enormous implications,

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[4] *Maxwell Communications* was concerned with alleged preferential transfers of funds and did not involve real property. Consequently, the analysis in the lower courts of whether or not application of § 547 of the Code to avoid the transfers would be extraterritorial action was very different from that involved here. In addition, in *Maxwell Communications,* there was a competing proceeding in a foreign country, a fact which impacted the question of international comity. In affirming the judgment of the District Court, the Second Circuit expressly did not decide the issue of extraterritoriality.

not only for the administration of bankruptcy cases, but in many other conceivable scenarios.

The decision of the United States Court of Appeals for the Fourth Circuit has altered the landscape of how our courts will adjudicate disputes concerning title to foreign property in a fundamental way, rejecting the application of a rule that has been applied in this country, by this Court and many others, for nearly 200 years, and in other countries for a still longer time. In taking such action, the Fourth Circuit has effectively abandoned basic principles of jurisprudence and has failed to follow the method of analysis mandated by this Court to determine when a United States statute may be applied beyond our borders. By this decision, the Court of Appeals has expanded the jurisdiction of our bankruptcy courts, arguably of all federal courts, in a manner which very likely will be offensive to friendly foreign governments. Finally, by this action, the Court of Appeals has refused to accord the benefit of international comity in a way that is contrary to basic principles of conflict of laws and international relations; and it has justified this decision based on a theory which makes no sense given the particular facts of this case.

Numerous prior decisions of this Court, notably *Clarke v. Clarke,* 178 U.S. 186, 20 S. Ct. 873, 44 L. Ed. 1028 (1900) and *Fall v. Eastin*, 215 U.S. 1, 30 S. Ct. 3, 54 L. Ed. 65 (1909), but going back as far as *United States v. Crosby,* 7 Cranch 115 (1812), have embraced and perpetuated the rule, taken from English common law, that the courts of one sovereignty may not act *directly* to affect the title to real estate located in another sovereignty. This rule is rooted in practicality, in the simple fact that, ultimately, the country in which real estate is situated holds all ultimate control over its title and disposition, no matter what the courts of another

jurisdiction may say.[5] This rule circumscribes the permissible limits of *in rem* jurisdiction and thus goes beyond issues of statutory construction, and it was effectively rejected or ignored in the present decision of the Court of Appeals.

B. The Decision of the Court of Appeals Misapplied, or Failed to Apply, the Standards for the Analysis of Extraterritoriality Mandated by Numerous Decisions of this Court.

The first question raised in the appeal below was whether or not § 548 of the Bankruptcy Code could be applied extraterritorially to nullify the Petitioners' otherwise undoubted title to real property in the Bahamas. In deciding this issue, the Fourth Circuit paid lip service to the rule that a federal statute is presumed to have domestic application only in the absence of clear evidence of Congressional intent to the contrary. Yet it did not actually apply the presumption as this Court has defined it in several decisions and instead ruled that § 548 could be applied extraterritorially despite a total lack of actual evidence that this was what Congress intended.

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[5] A leading English treatise put it this way:

> The sovereign of the country where land is situate has absolute control over the land within his dominions; he alone can bestow effective rights on it; his courts alone are, as a rule, entitled to exercise jurisdiction over such land. Consequently, any decision by an English court which ran counter to what the lex situs had decided or would decide would be in most cases a *brutum fulmen*.

Dicey and Morris, *The Conflict of Laws (2- Ed. 1987)*, Rule 118; App. 129-30. A "brutum fulmen" is an obscure Latin phrase generally translated to mean a harmless threatening or innocuous thunderbolt (cf. www.winikopedia.com).

First, in a preliminary way, the Fourth Circuit questioned whether or not the application of § 548 to invalidate Petitioners' title actually amounted to extraterritorial application of the statute, despite the fact that this Court, in *Oakey v. Bennett,* used the term "extraterritorial" to describe the analogous application of the 1841 bankruptcy law to foreign real estate.[6] Indeed, the idea that such an exercise of jurisdiction is extraterritorial was the whole point of *Fall v. Eastin* and a host of similar cases.[7] Secondly, again preliminarily, the Court of Appeals considered a legal fiction utilized in a few of the reported cases in which it was held that the exercise of *in rem* jurisdiction is proper and not extraterritorial where the property in question is property of the bankruptcy estate within the meaning of § 541, because such property is within the court's custody and therefore, in a technical sense, within the United States. In the end, however, the Fourth Circuit declined to decide the issue on that ground. Instead, the Fourth Circuit held that the presumption against extraterritoriality was overcome by what it described as "several indicia of Congressional intent." App. 9.

What was this evidence? There is no statement in the statute itself to indicate such Congressional intent.

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[6] As the Court also did in *Clarke*; 178 U.S. at 194. The Court of Appeals speculated that the term "extraterritorial" should perhaps apply only where the conduct which the statute seeks to regulate occurred primarily outside of the United States. Such a definition might make sense with regard to a statute exclusively concerned with the conduct of persons, but it does not work where the subject matter is title to real property.

[7] The structure of the Bankruptcy Code compels the exercise of *in rem* jurisdiction by breaking the "avoidance" of the transaction (under § 548) and the recovery of the property or its value (under § 550) into separate sequential steps. No order can be entered with respect to the ultimate remedy of "recovery" until the transfer has first been invalidated.

There is nothing in the legislative history to indicate such intent. There are no administrative decisions to indicate such intent. There are no reported decisions (until this case) in which such intent has been found. Indeed, the Bankruptcy Court and the District Court in *Maxwell Communications I* and *II* found a notable absence of evidence of Congressional intent with regard to § 547, and there is nothing in § 548 which would distinguish it insofar as this point is concerned.

The prior decisions of this Court have established that the question of extraterritoriality depends on whether or not the intent of Congress, as it appears from all available evidence, is "*clear.*" *Smith v. United States,* 507 U.S. 197, 203, 113 S. Ct. 1178, 1183, 122 L. Ed. 2d. 548, 555 (1993). To overcome the presumption, there must be "affirmative evidence of intended extraterritorial application." *Sale v. Haitian Centers Council, Inc.,* 509 U.S. 155, 176 and n.32, 113 S. Ct. 2549, 2561, 125 L. Ed. 2d. 128, 148 (1993). If there is no evidence of intent, or if the evidence of intent is not clear, then the statute may be applied domestically only.[8] The Fourth Circuit's decision departed significantly from this rule.

It is clear that the Court of Appeals, like the District Court, was deeply troubled by the possibility that the restriction of § 548 to domestic application, insofar as real estate was concerned, amounted to a loophole in bankruptcy enforcement which, to the thinking of the Court, was intolerable. This, indeed, was the main reason the District Court had held the presumption to

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[8] Two commentators relied on by the Respondent below who have argued passionately for extraterritorial application of the Bankruptcy Code (as a whole) concluded, in the end, that the evidence of Congressional intent on this issue was "less than clear" and that Congress should act to clarify the matter. Cf. David M. Green and Walter Benzija, *Spanning the Globe: The Intended Reach of the Bankruptcy Code,* 10 Am.Bankr.Inst.L.Rev. 85 (Spring 2002), App. 139.

have been overcome.[9] Thus, the Fourth Circuit embarked on a difficult and confusing comparison of the language of § 541 with similar language in § 548 to suggest, in effect, that Congress intended the worldwide jurisdiction provided as to estate property in 28 U.S.C. § 1334(e) to be exercised here as well, even if the property in question might not actually be property of the estate (a point which the Fourth Circuit explicitly did not decide).

In its analysis, the Fourth Circuit noted, first of all, that the term "property of the estate" as defined in § 541 refers to foreign as well as domestic property. Next the Court of Appeals took note that "property of the estate" includes all interests of the debtor in property and that § 548 authorizes a trustee to avoid a transfer of property that would have been property of the estate had the transfer not occurred. These points, of course, are obvious from a plain reading of the statutes. The Court of Appeals then observed that the term "an interest of the debtor in property," as it appears elsewhere in the Code, refers to the same kinds of interests described by the term "property of the estate." From this alone, the Fourth Circuit leaped to the conclusion that

> Through this incorporation, Congress made manifest its intent that §548, absent a prepetition transfer, would have been

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[9] The District Court believed that Congress *must* have intended to avoid such a loophole because the avoidance powers are so "key provisions" in bankruptcy administration. This belief alone constituted the "evidence" by which the District Court held that the presumption against extraterritoriality had been overcome; cf. App. 31. Like the Fourth Circuit decision, this conclusion was based on an assumption and not on actual evidence of intent. It was also clear that the District Court's concern related to *deliberate and intentional fraud* as opposed to constructive fraud. Plainly the same thinking colored the Fourth Circuit's decision, which referred to Betty French, the giver in this totally innocent transaction, as the "perpetrator" of the fraud. App. 6.

> property of the estate, *wherever that property is located.*

App. 11 (emphasis added). Then, finding that such an interpretation was in accord with the overall purpose of the avoidance provisions, "which is to prevent debtors from illegitimately disposing of property that should be available to their creditors," the Court of Appeals concluded that "[i]n furtherance of this purpose" Congress provided that the "interests of the debtor in property" as utilized in § 541 – wherever located – and thus "demonstrated an affirmative intention" to authorize avoidance of transfers of foreign property which "but for a fraudulent transfer, would have been property of a debtor's estate." App. 11.

This giant leap, essentially a *non sequitur,* is devoid of support in logic or in the statutory framework.

Plainly it does not amount to the kind of evidence required to overcome the presumption against extraterritoriality. Section 547(b) also contains the word "transfer" and is clearly meant only to define the types of transfer that may be avoided. However, nothing in § 547(b) or in § 548, where the same phrase appears, suggests that the interest in property, *having been transferred,* is property of the estate at the time the avoidance action is filed or that such property is subject to the exercise of worldwide jurisdiction under 28 U.S.C. § 1334(e). The "linkage" between § 541 and the avoidance sections merely defines the kinds of property transfers that may be subjected to avoidance, i.e., transfers of property that *would have been* property of the debtor but for the transfer. This is not evidence that Congress intended to exercise jurisdiction extraterritorially in aid of the avoidance sections.

The grant of jurisdiction in § 1334(e) of Title 28 is carefully circumscribed and subject to strict construction. Property belonging to third parties is not "property of the debtor" or "property of the estate." Section 541 includes, as estate property, "property recovered" by a trustee as the result of an avoidance action; but the logical construction of such a provision based on plain language is that such property which has been transferred to a third party prepetition becomes "property of the estate," and thus subject to worldwide jurisdiction, only *after it has been recovered.* If Congress had intended to extend worldwide jurisdiction to property which had been transferred, and not yet recovered, surely it would have said so.

Significantly, the words "wherever that property is located" which the Court of Appeals believes should apply to avoidable transfers do not appear in Section 547 or in Section 548. The omission of such language, if anything, indicates Congressional intent to the contrary; cf. e.g., *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 588, 112 S. Ct. 2130, 2151, 119 L. Ed. 2d 351, 382 (1992)(Stevens, J., concurring).

The argument against the interpretation by the Fourth Circuit is even stronger because the case involves extraterritorial application of § 548 to invalidate a title to real property. This Court has repeatedly noted that "Congress legislates against the historical backdrop of the presumption against extraterritoriality," and if it wishes to authorize the extraterritorial exercise of jurisdiction, it is aware that there must at least be clear evidence to support that intent, if not express language in (or from) the statute itself. Congress knows how this must be done. Cf. *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 440, 109 S. Ct. 683, 102 L. Ed. 2d. 818 (1989). A failure to express such intent is strong evidence that Congress did not intend to authorize extraterritorial

application of a statute. Congress also legislates against the backdrop of this Court's previous decisions on the exercise of jurisdiction and, in matters involving extraterritoriality, with some regard to the norms and principles of conflicts of law and international comity. Yet the Court of Appeals utterly failed to note the historical force of the rule against the extraterritorial application of *in rem* jurisdiction to foreign real estate or its possible significance to the issue. The ideas expressed in *Fall v. Eastin* and perhaps most significantly in *Oakey v. Bennett* also reflect the positions taken by many other countries, including the Bahamas and other British Commonwealth countries. Does it not stand to reason that, knowing these things, Congress would have expressed its intent more clearly if it had actually intended to authorize the exercise of *in rem* jurisdiction in this manner?

The Fourth Circuit also failed to take note of, or at least does not mention, that there is evidence in the construction of the Code suggesting that there was no intent to apply § 548 extraterritoriality. Along with § 548, the Code contains Section 544, App. 72, which authorizes a Trustee, when he thinks it desirable or necessary, to go into a state or foreign court and seek avoidance of a fraudulent transfer under local law. Such action would not have been successful under the facts of this particular case, but that does not alter the fact that Congress recognized there were occasions when local law might provide a necessary remedy. Further, the enactment of numerous sections of the Code dealing with ancillary proceedings in foreign courts, including some amendments which just became effective, indicate that Congress was aware of the possible need to provide for the administration of property in a foreign setting, yet it took no action to provide for the extraterritorial application authorized here by the Court of Appeals.

There is considerable confusion in the few reported cases as to when it is permissible for a Bankruptcy Court to exercise its jurisdiction extraterritorially. To a large degree, courts considering such matters have evaded an orthodox examination of Code sections in light of the presumption against extraterritoriality. These cases have tended to be very result-oriented and are typified by the use of procedural gyrations or resort to legal fictions to avoid the presumption entirely. Some, such as *Simon,* have upheld the exercise of jurisdiction by finding that the property in question – always personal property – was property of the estate and therefore constructively always within the United States even though it may physically be located in another country. Another theory utilized in *Simon* was the fact that there, the party in question had voluntarily participated in the bankruptcy case. Other cases have authorized extraterritorial application as a necessary adjunct to basic bankruptcy jurisdiction, such as the ability of a court to enforce its own injunctions or the automatic stay; *see, for example, Nakash v. Zur (In re Nakash),* 190 B.R. 763 (Bkrtcy. S.D. N.Y. 1996)(enforcement of the automatic stay). But, until now, there have been no such cases involving the title to foreign real property; and no cases have attempted, until this one, to extend the Court's jurisdiction based on a "frontal" approach to the presumption against extraterritoriality, as the District Court put it. App. 31.

A major area of apparent confusion that affected both the District Court decision and the Fourth Circuit decision, and one which the Fourth Circuit mentioned but did not squarely decide, is the jurisdictional line that divides estate property from non-estate property. Both of these Courts failed to implement that distinction in their thinking. Both felt that the need to gather the assets of the debtor for distribution to creditors provided primary impetus to the bankruptcy system as a whole, and they

both relied on case authority to that general effect to buttress their core belief that the only way to implement the Code effectively was to treat estate property and non-estate property as both being within worldwide jurisdiction. Yet in drafting 28 U.S.C. § 1334(e), Congress plainly draws a jurisdictional line between estate property and non-estate property, and it carried that distinction into § 541 by including property that had been the subject of a fraudulent or preferential transfer only *after* it had been recovered under § 550. As part of the overall controversy, Petitioners believe that this Court can do a great service by clarifying this issue, which the Court of Appeals expressly did not decide but which was nevertheless a central aspect of its thinking. A decision on this point may be unavoidable.

The great importance of the question of extraterritoriality and the fact that it has never previously been decided as to § 548; the fact that the Fourth Circuit's analysis and decision are in conflict with numerous cases of this Court limiting the use of *in rem* jurisdiction to affect the title to foreign real estate; the fact that the Fourth Circuit has failed to follow the methodology prescribed by this Court for analysis of extraterritoriality and, that, to the extent it has attempted to follow that method, it has done so incorrectly; the fact that a decision of this kind is likely to be unenforceable as a practical matter, because it will be rejected by the foreign sovereign; and the fact that there is such confusion generally in the cases on extraterritorial applications of various sections of the Bankruptcy Code; and the fact that numerous unsettled subsidiary issues, such as the question of whether or not property subject to an avoidance action should be treated as estate property for jurisdictional purposes (on which the Fourth Circuit saw a split among the circuits), all indicate that review by this Court would be appropriate and extremely beneficial.

C. The Court of Appeals Misapplied the Standards for Analysis of the Question of International Comity by Failing to Give Due Weight to the Law of the Situs and By an Inappropriate Restriction on Application of the Doctrine.

Though they are not the same, the question of extraterritoriality and that of international comity are certainly interwined. Apart from the practical reasons which underly this Court's many decisions limiting the exercise of *in rem* jurisdiction, such as *Oakey v. Bennett*, *Clarke v. Clarke,* and *Fall v. Eastin,* there is also the consideration of comity. This is one of the main reasons that the presumption of extraterritoriality exists, "to avoid unintended clashes" between our law and the law of other countries; cf. *Foley Bros., Inc. v. Filardo,* 336 U.S. 218, 285, 69 S. Ct. 575, 577, 93 L. Ed. 680, 683 (1949); also *Equal Opportunity Commission v. Arabian American Oil Co.,* 499 U.S. 244, 249, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991). Congress is understood to have taken this into account when it enacts legislation; *Hartford Fire, supra,* 509 U.S. at 814-5 (Scalia, J., dissenting).

Petitioners had argued that the interest of a foreign sovereign in the control of real property within its borders and the force of the *lex situs* rule overrode all other considerations, that the exercise of in rem jurisdiction to invalidate the title to real estate located in a foreign country was impermissible and wrong and would be offensive to the foreign country involved. Like the District Court, however, the Fourth Circuit saw little force in the arguments of the Petitioners, primarily because the Petitioners themselves are U.S. citizens and, to some extent, because some of the events surrounding the transaction in question took place in the United States. In effect, the Fourth Circuit and the District

Court did not perceive a governmental interest by the Bahamas in the outcome of this case, and so both refused the Petitioners' request that they decline to exercise jurisdiction on grounds of international comity. Further, they believed that the interests of the United States overrode those of the Bahamas.

In its analysis, the Fourth Circuit first referred to the Restatement (Third) of the Foreign Relations of the United States, Section 403(1), which lays down a number of factors that may be considered in analysis of an international comity question; *see Hartford Fire (Scalia, J., dissenting).* The use of such factors, in general, comports with the general principle of conflict of laws utilized by federal courts in cases involving personal property, i.e., a consideration of contacts with the jurisdictions involved. But in a case where title to real estate is at issue, the *lex situs* becomes the one factor that overwhelms all others.

Rejecting this approach, the Fourth Circuit attempted to employ an "interests" analysis to the question, greatly diminishing the force of the *lex situs* rule in one stroke. Indeed, the Court of Appeals regarded that as having little force. Instead, the Court of Appeals relied on Restatement (Second), Conflict of Laws, ch. 9, topic 2, introductory note, for the principle that the *lex situs* rule "need not govern 'the allocation of interests in land [between]...creditor and debtor' if 'regulation of the relationship is of greater concern to a state other than the *situs*.'" Further, the Fourth Circuit noted that there were situations "'when the land is part of an aggregate of property which it is desirable to deal with as a unit'" when the *lex situs* has not been applied. The Fourth Circuit then had little difficulty finding that there was a paramount U.S. interest here and that the property in question was part of an "aggregate," which it defined as "the bankrupty debtor's estate." App. 14.

This analysis, unfortunately, was predicated on a significant distortion of the principles discussed in the referenced introductory note to Section 9 of the Restatement. The Restatement Note itself does not suggest that a weighing of competing governmental interests by the *forum* court, according to the *law of the forum*, is appropriate when the title to real estate is at issue. What it says plainly is that the forum court must make its determination *according to the choice of laws rule that the situs court would apply.* This is entirely in accordance with the general principle set forth in Restatement (Second), Conflicts of Laws, § 223, to effect that the law of the situs is the paramount law governing case involving title to real estate. And it can hardly be doubted that, in this case, a Bahamian court would apply strictly the law of the *situs*, as that rule is firmly established in English law and in the law as applied throughout the Commonwealth.[10]

Indeed, the Introductory Note on which the Fourth Circuit's entire argument is based acknowledges that, "[i]n most instances, the courts of the situs would decide

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[10] The Bahamas, as a British Commonwealth country, has its own statute laws but is otherwise a common law jurisdiction. Decisions of the Queen in Council (the Privy Council) are binding law; other English and Commonwealth decisions, however, are looked to as precedent as the Bahamas has relatively few reported cases. One Commonwealth case that resonates clearly here is *Duke v. Andler,* [1932] 4 D.L.R. 529 (Supreme Court of Canada, 1932), reproduced at App. 78. There the issue before the court was whether or not to give effect to a California judgment that the defendants, California residents, had fraudulently transferred property in British Columbia. The plaintiffs (also California residents) had secured a judgment to that effect; and the California Court had ordered the defendants to reconvey the property. When they refused, the California court appointed a commissioner to execute a deed on behalf of the defendants, and the precise question in *Duke v. Andler* was whether or not to give effect to that deed. Applying Canadian law, which it said must govern in such a case, the Supreme Court held that no California court had jurisdiction to determine the title to real estate in Canada, regardless of the citizenship of the parties. *See particularly* App. 90-5.

the case in accordance with their own local law." This will certainly be the case where the question is involves "issues as to who may own the land....The state of the situs has the dominant interest in the determination of such issues and its local law should be applied." The rare exceptions to the rule, where the Introductory Note recognizes some circumstances in which the *situs* court might decide otherwise, involve technical or procedural matters or matters of substance that do not actually involve title to the property and in which the situs court would likely defer to the law of another jurisdiction. It is within the context of these remarks that the Introductory Note mentions, as one example, the situation where the disposition of land as part of an aggregate of property may be desirable. The Fourth Circuit seized on this language to justify its decision on international comity, defining the "bankruptcy debtor's estate" as such an "aggregate." Yet common sense tells that this is not what the Introductory Note was referring to. The fact that that several properties may be under common ownership or even under common administration by a successor does not necessarily make them "an aggregate." This is true of bankruptcy estates as well, which are frequently liquidated piecemeal. In fact, there was nothing in the circumstances of this case to suggest that it would be necessary or desirable for the Bahamas property to be disposed of in a sale of property in the "aggregate." The Fourth Circuit reached its conclusion in the abstract, without any evidence on this point.[11]

The extent to which the Fourth Circuit departed from the substance of the Restatement while claiming to rely on it is perhaps best illustrated by one of the examples set forth in the Note: that of a case in which a deed is delivered in state Y respecting property in state X

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[11] There was no evidence whatsoever as to the components of Betty French's bankruptcy estate.

which was alleged to be in fraud of creditors in state Y. Such a case, according to the Restatement Introductory Note, would be decided by the law that would have been applied by the X courts. In this case, of course, the Fourth Circuit effectively applied the law of Y.

At the same time, the Fourth Circuit opined that there was no actual danger of a clash of laws because, in this case, there was no competing proceeding in the Bahamas to which the court might defer. By this, the Fourth Circuit suggests that the clash of laws is an illusion and that international comity does not come into play absent a competing proceeding. However, in fact, the clash has already occurred; as persons entitled to the protection of a foreign law, cf. *Hilton v. Guyot,* 159 U.S. 113, 163-4, 40 L. Ed. 95, 16 S. Ct. 139 (1895), the Petitioners are entitled to rely on that law whether or not a competing proceeding now exists. There is no legitimate reason why the Petitioners should be denied the protection of that law on account of their citizenship. As Justice Scalia pointed out in his dissent in *Hartford Fire,* the doctrine of "prescriptive comity" depends on an analysis of the *relative interests of the countries involved;* 509 U.S. at 818. It is essential, therefore, to consider the importance of the issues *seen from a Bahamian point of view.*

Moreover, an eventual clash in a Bahamian court is highly likely if not inevitable. In practical terms, if the Trustee were to take title under this decision and then attempt to sell the property, his title would certainly be clouded; the controversy is bound to arise at some point, just as it would have done here, had the land been located here, by a simple title search performed at the request of the buyer or the buyer's lender. The Commonwealth of the Bahamas is not a signatory to any treaty with respect to the enforcement of U.S. judgments. Consequently, under Bahamian law, a party seeking to rely on a U.S.

judgment must file suit in a Bahamian court and either establish rights anew or persuade the Bahamian court to honor the foreign judgment. A Bahamian Court, however, is not likely to recognize the jurisdiction of a United States Court to adjudicate the title to Bahamian real estate; cf. *Duke v. Andler, supra.* The clash of laws is here now and would be unavoidable in the future.

There are significant differences between Bahamian avoidance law and United States avoidance law, and under Bahamian law, the transfer at issue here could not be invalidated. The only statute under which a transfer can be set aside as fraudulent, under Bahamian law, is the Fraudulent Dispositions Act, 1991, App. 109. That law applies only in cases involving transfers that were intended to defraud creditors. There is no such thing, in Bahamian law, as a "constructively" fraudulent transfer. Moreover, there is no such thing as a "deemed" date of transfer; the transfer presumably occurs when it is completed under local law; and, under Bahamian law, which follows English law, the transfer of ownership of real property is complete when a deed has been delivered; cf. Odgers, *The Construction of Deeds and Statutes (3d Ed. 1951),* App. 140. Recordation of a deed is not required to achieve a valid or complete transfer of real property; *see Stewart Estate v. Cartwright,* [2001] BHS J No. 60 1999 No. 1375 (Bahamas Supreme Court, Equity Side, 2001), App. 104, in which the only question in determining the validity of an unrecorded deed of gift to real estate was the issue of delivery. Consequently, insofar as Bahamian law is concerned, the transfer of property in this case occurred in 1981, not 2000. Given that the Fraudulent Dispositions Act has a two-year limitations period, App. 110, the action would be barred. Moreover, although the Trustee might be regarded in the Bahamas as a representative of the bankruptcy estate, he would not be accorded extraordinary powers such as he is entitled to under the Bankruptcy Code as English and

Commonwealth countries typically do not recognize such powers; *see, e.g., Galbraith v. Grimshaw,* [1910] A.C. 508, App. 96 (House of Lords, 1910), App. 96, holding that a Scottish bankruptcy trustee has no extraordinary powers in an English court.

The sum of all this is that a U.S. bankruptcy trustee could not prevail in a Bahamian court on an action brought under § 548, nor, indeed, in any action to avoid a constructively fraudulent transfer; and moreover, even if suit were brought on an intentionally fraudulent transfer, this would have to be done within limitations. However, a proper case to avoid such a transfer could be brought in the Bahamas pursuant to § 544 of the Code.

The existence of Section 544 answers one of the concerns that has permeated this case at all levels, which is quite simply the perceived existence of an unacceptable "loophole." While it may not be a perfect remedy from the perspective of the Court of Appeals, it does, at least, offer the possibility of a solution without offending basic concepts of jurisdiction or international law. Whether or not a trustee can prevail will depend on circumstances of the particular case. Whether or not it is economical for a Trustee to pursue such a case in a foreign forum is likewise case-specific. It may be that Section 544 affords an imperfect and more expensive choice than § 548, but at least it has the advantage of avoiding problems with enforcement and of eliminating any possible conflict of laws.

On a more fundamental level, it is not the business of the courts to fashion remedies for perceived "loopholes" in federal statutes, even though on policy grounds they may have legitimate reasons for concern. It is all too obvious from the verbiage adopted by the Fourth Circuit that the major concern was with the prevention or avoidance of intentionally fraudulent transfers, which

were not at issue in this case and which could have been set aside under local law had an action been timely brought. That concern, however legitimate, does not justify a decision supporting the exercise of extraterritorial jurisdiction to invalidate a completely innocent transfer of real property in a foreign country. Several different possible solutions may exist to solve the problem of intentionally fraudulent transfers without affecting the rights of transferees in an innocent transaction. This Court has never hesitated to point out problems and invite the attention of the Congress to fashioning a solution.

CONCLUSION

This case presents numerous issues of great importance. In this factual scenario, and with respect to § 548, they are issues of first impression in an area of law in which the reported cases nationwide evidence no clear approach or answer. This alone indicates that the questions presented should be reviewed by this Court. Yet the approach taken by the Court of Appeals also raises yet more troubling questions, as that Court appears to have abandoned some 200 years of jurisprudence and many decisions of this Court in order to reach its result. The Fourth Circuit's analysis of extraterritoriality is at odds with the well-established rule that compels a court to consider whatever actual evidence of Congressional intent exists, to base its decision only on actual evidence of intent, and to withhold extraterritorial application of the law where the intent of Congress is unclear. It is also contrary to a number of decisions in which this Court has held that the exercise of jurisdiction by one sovereignty or state to invalidate title to real property located elsewhere is improper. It has applied improper standards of analysis to the question of international comity and, in doing so, has apparently misinterpreted and misapplied the approach laid down by

the principal authority on which it relies. To address these issues and rectify the problems posed by the decision below, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STANTON J. LEVINSON
Counsel for the Petitioners

MAY 15, 2006

TABLE OF CONTENTS
Appendix to Petition

Page

Published Opinion of
The United States Court of Appeals
For The Fourth Circuit
entered February 16, 2006 ..... App. 1

Order of
The United States District Court
For the District of Maryland
Re: Affirming the Decision of the Bankruptcy Court
entered December 8, 2004 ..... App. 19

Memorandum Opinion of
The United States District Court
For the District of Maryland
entered December 8, 2004 ..... App. 20

Order of
The United States Bankruptcy Court
For the District of Maryland
Re: Granting Trustee's Motion for Summary Judgment
entered April 21, 2004 ..... App. 35

Memorandum Opinion of
The United States Bankruptcy Court
For the District of Maryland
entered April 21, 2004 ..... App. 37

Order of
The United States Bankruptcy Court
For the District of Maryland
Re: Denying Defendants' Motion to Dismiss
entered October 8, 2004 ..... App. 45

Memorandum Opinion of
The United States Bankruptcy Court
For the District of Maryland
entered October 8, 2004 ..... App. 47

Judgment of
The United States Court of Appeals
For The Fourth Circuit
entered February 14, 2006 ..... App. 70

11 U.S.C. § 541 ..... App. 71

11 U.S.C. § 544 ..... App. 72

11 U.S.C. § 547 ..... App. 73

11 U.S.C. § 548 ..... App. 74

11 U.S.C. § 550 ..... App. 76

28 U.S.C. § 1334(e) ..... App. 77

Duke, et al. v. Andler, et al.,
[1932] 4 D.L.R. 529;
1932 D.L.R. LEXIS 649 ..... App. 78

H. L. (E.) Galbraith v. Grimshaw, et al.,
[1910] 1 K. B. 339, [1910] L. R. 508 ..... App. 96

Stewart Estate v. Cartwright,
[2001] BHS J. No. 60 1999 No. 1375 ..... App. 104

Excerpts of the Bahamian Fraudulent
Dispositions Act, 1991 ..... App. 109

Bahamian Registration of Records Act, 1928,
Chapter 175 ..... App. 112

Restatement of the Law,
Second, Conflict of Laws, § 223 ..... App. 115

Dicey and Morris,
The Conflict of Laws,
(2nd Ed. 1987) ..... App. 127

Excerpt of David M. Green & Walter Benzjia,
Spanning the Globe: The Intended Reach of the Bankruptcy Code,
10 Am.Bankr.Inst.L.Rev.85 (Spring 2002) ..... App. 139

Excerpt of Odgers, Sir Charles E.,
The Construction of Deeds and Statutes,
(3d ed. 1951) ..... App. 140

Filed: February 16, 2006

[ENTERED: FEBRUARY 16, 2006]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 05-1054
(CA-04-1947-WMN)

In Re: BETTY I. FRENCH,
Debtor,

RANDY LEE FRENCH; DONNA MARIE SHAKA,
Appellants,

versus

GEORGE W. LIEBMANN,
Trustee - Appellee.

ORDER

The court amends its opinion filed February 14, 2006, as follows:

On the cover sheet, the second sentence of the disposition section is corrected to read:

"Judge Motz wrote the opinion, in which Judge Wilkinson and Judge Michael joined."

For the Court
/s/ Patricia S. Connor
Clerk

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In Re: BETTY I. FRENCH,
Debtor.

RANDY LEE FRENCH;
DONNA MARIE SHAKA,
Appellants,

v.

GEORGE W. LIEBMANN,
Trustee-Appellee.

No. 05-1054

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William M. Nickerson, Senior District Judge.
(CA-04-1947-WMN)

Argued: November 29, 2005
Decided: February 14, 2006

Before WILKINSON, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Wilkinson and Judge Michael joined. Judge Wilkinson wrote a separate concurring opinion.

COUNSEL

Stanton J. Levinson, Silver Spring, Maryland, for Appellants. Orbie R. Shively, GEORGE W. LIEBMANN, P.A., Baltimore, Maryland, for Appellee.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

This appeal presents the question of whether a United States bankruptcy court can avoid a constructively fraudulent transfer of foreign real property between United States residents. The transferees here argue that the presumption against extraterritoriality and the doctrine of international comity preclude application of the Bankruptcy Code. Both the bankruptcy court and the district court rejected these arguments and allowed avoidance. For the reasons that follow, we affirm.

I.

In 1976, Betty Irene French, a resident of Maryland, purchased a house in the Bahamas. At a Christmas party held in Maryland in 1981, she gave a deed of gift to the Bahamian property to her children, Randy Lee French, a resident of Maryland, and Donna Marie Shaka, a resident of Virginia (hereinafter "the transferees"). Assertedly to avoid high Bahamian transfer taxes, the transferees decided not to immediately record the deed in the Bahamas.

In the late 1990s, Mrs. French and her husband began experiencing serious financial problems. Concerned by this downturn, the transferees decided at last to record the deed in the Bahamas, a task they accomplished through a Bahamian attorney in mid-2000. In October 2000, Mrs. French's creditors filed an involuntary

Chapter 7 bankruptcy petition against her. The bankruptcy court entered an Order for Relief on January 29, 2001.

On August 22, 2002, the bankruptcy trustee, George W. Liebmann, filed an adversary proceeding against the transferees to avoid the transfer of the Bahamian property and to recover the property or its fair market value for the benefit of the estate.[1] In his complaint, the trustee alleged (in pertinent part) that the debtor and the transferees had engaged in a constructively fraudulent transfer, as defined by the Bankruptcy Code, because the debtor had been insolvent at the time of the transfer and had received less than a reasonably equivalent value in exchange. *See* 11 U.S.C. § 548(a)(1)(B) (2000).

The transferees conceded that the debtor never received a reasonably equivalent value for her gift of the Bahamian property, and they further conceded that the debtor was insolvent in 2000, when the deed was recorded. These facts would normally be sufficient to establish constructive fraud.

Nevertheless, the transferees filed a motion to dismiss before the bankruptcy court based on two grounds. First, they invoked the presumption against extraterritoriality, contending that because of it § 548 should not apply to transfers of foreign property. Second, they maintained that considerations of international comity counseled the application of Bahamian (rather than United States) bankruptcy law, which assertedly

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[1] As required by the Bankruptcy Code, 11 U.S.C. § 548(d)(1) (2000), all the parties consider the transfer in question to have taken place with the recordation of the deed in 2000, not with the transfer of the deed of gift in 1981.

would allow the transferees to retain the Bahamian property.

The bankruptcy court rejected the transferees' arguments and denied their motion to dismiss. *Liebmann v. French (In re French)*, 303 B.R. 774 (Bankr. D. Md. 2004). The trustee then moved for summary judgment, which the bankruptcy court granted by finding the transfer to be constructively fraudulent; the district court affirmed. *French v. Liebmann (In re French)*, 320 B.R. 78 (D. Md. 2004). The transferees noted a timely appeal.

II.

"It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) [hereinafter *Aramco*] (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). However, courts only apply this presumption against extraterritoriality when a party seeks to enforce a statute "beyond the territorial boundaries of the United States." *Id.*; *see also Kollias v. D & G Marine Maint.*, 29 F.3d 67, 72 (2d Cir. 1994). The presumption has no bearing when "the conduct which Congress seeks to regulate occurs largely within the United States" — that is, when regulated conduct is domestic rather than extraterritorial. *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993). Thus, before deciding how the presumption affects the interpretation of a given statute, a court should consider whether the presumption applies at all. Both parties have treated the application of § 548 to the transfer here as extraterritorial. This assumption may not be warranted.

This court has never defined when conduct is extraterritorial for purposes of the presumption. We have recognized, however, that a similar inquiry — defining

"foreign conduct" — is particularly challenging in cases (like this one) that involve a "mixture of foreign and domestic elements." *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 286 (4th Cir. 2002).

In this case too, we believe that any definition must eschew rigid rules in favor of a more flexible inquiry into the "place" of regulated conduct. Minimal contact with the United States should not automatically render conduct domestic. *See Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1538 (9th Cir. 1994); *Kollias*, 29 F.3d at 72; *Maxwell Commc'n Corp. PLC v. Societe Generale PLC (In re Maxwell Commc'n Corp.)*, 186 B.R. 807, 817 (S.D.N.Y. 1995) [hereinafter *Maxwell II*]. Nor should minor contact with another country suffice to render conduct extraterritorial. *See Massey*, 986 F.2d at 531-32; *Maxwell Commc'n Corp. PLC v. Societe Generale PLC (In re Maxwell Commc'n Corp.)*, 170 B.R. 800, 809 (Bankr. S.D.N.Y. 1994) ("Not every transaction that has a foreign element represents an extraterritorial application of our laws."); Jay Westbrook, *The Lessons of Maxwell Communications*, 64 Fordham L. Rev. 2531, 2538 (1996). To avoid these extremes, we have held for purposes of the Sherman Antitrust Act that, in determining whether conduct is "foreign" or "domestic," "a court should consider whether the participants, acts, targets, and effects involved" in the transaction at issue "are primarily foreign or primarily domestic." *Dee-K Enters.*, 299 F.3d at 294. We think that an equally flexible test taking into account "all component events of the transfer[ ]," *Maxwell II*, 186 B.R. at 816, is appropriate to determine whether an allegedly fraudulent transfer occurred extraterritorially.

In this case, the perpetrator and most of the victims of the fraudulent transfer — all except a single Bahamian creditor — have long been located in the United States. Given these facts, the effects of this

transfer were (naturally) felt most strongly here, and not in the Bahamas.

We also find it significant that the conduct constituting the constructive fraud occurred in the United States. Section 548 defines a constructively fraudulent transfer, *inter alia*, as one where (1) the debtor was insolvent, and (2) the debtor received "less than a reasonably equivalent value in exchange." 11 U.S.C. § 548(a)(1)(B); *see also In re GWI PCS 1 Inc.*, 230 F.3d 788, 805 (5th Cir. 2000). Here, domestic facts and conduct establish both elements. The determination of Mrs. French's insolvency relies almost entirely upon a comparison of domestic debts and assets. And the decision not to provide a "reasonably equivalent value" for the transfer was made in the United States as well — whether we consider the relevant decision to be Mrs. French's gift of the deed in 1981, or the transferees' recordation of the deed in 2000.

However, we recognize that two aspects of this transfer indisputably involve foreign facts and conduct. The first is relatively insignificant: the transferees' Bahamian lawyer recorded their deed to the property in the Bahamas. The physical place where the deed was recorded is at most "incidental" to the actual conduct proscribed by § 548. *See Gushi Bros.*, 28 F.3d at 1538-39. Moreover, although the act of recordation necessarily took place abroad, the transferees themselves may well have been located in the United States both when they decided to record the deed and when they arranged for the Bahamian lawyer's services (the record is not clear on this point).

More importantly, the transferees emphasize that the real property at issue in this case is located in the Bahamas. At first blush, this fact does not seem critical because § 548 focuses not on the property itself, but on the fraud of transferring it. In this case, the facts

underlying the fraud occurred here. However, the law has long recognized the powerful interest that states and nations have in the real property within their boundaries; the strength of that interest explains why the law of the situs generally applies to real property. *See, e.g.*, *Oakey v. Bennett*, 52 U.S. 33, 44-45 (1850); *Robinson v. Campbell*, 16 U.S. 212, 219 n.a (1818); Restatement (Second) of Conflict of Laws § 223 comm. b (1974); *cf.* Robby Alden, Note, *Modernizing the Situs Rule for Real Property Conflicts*, 65 Tex. L. Rev. 585, 591-98 (1986-1987) (summarizing arguments on the importance of the location of real property); *but cf. Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. ___, 2006 WL 151985, at *8 (Jan. 23, 2006) ("[The] exercise [of bankruptcy jurisdiction] does not, in the usual case, interfere with state sovereignty even when States' interests are affected.").

Given this long history, the fact that application of United States law could affect Bahamian real property, however indirectly, perhaps merits special weight in the balancing test. The parties in this case certainly seem to believe so — from the outset both sides have treated § 548's reach as extraterritorial. Here, we need not resolve this slippery question. This is so because even if we assume that the application of the Bankruptcy Code would be extraterritorial, the presumption against extraterritoriality does not prevent its application to the transfer at issue here.

III.

Although the presumption against extraterritoriality is important to "protect against unintended clashes between our laws and those of other nations which could result in international discord," it nevertheless must give way when Congress exercises its undeniable "authority to enforce its laws beyond the territorial boundaries of the United States." *Aramco*, 499

U.S. at 248. Thus, whether a given statutory provision should be given extraterritorial effect is a question of congressional intent; there must be the "'affirmative intention of the Congress clearly expressed'" to apply the provision abroad. *Id.* (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). To determine whether Congress has expressed such an affirmative intention, courts may look to "all available evidence," *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993), including the text of the statute, the overall statutory scheme, and legislative history. *See Smith v. United States*, 507 U.S. 197, 201-03 & n.4 (1993); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285-88 (1949); *United States v. Gatlin*, 216 F.3d 207, 212 (2d Cir. 2000). In this case, several indicia of congressional intent rebut the presumption against extraterritoriality.

Pursuant to § 541 of the Bankruptcy Code, all of a debtor's property, whether domestic or foreign, is "property of the estate" subject to the bankruptcy court's *in rem* jurisdiction. *See Hong Kong & Shanghai Banking Corp., Ltd. v. Simon (In re Simon)*, 153 F.3d 991, 996 (9th Cir. 1998) [hereinafter *Simon*]. Section 541 defines the property of the estate broadly as all property "wherever located." 11 U.S.C. § 541(a) (2000). This phrase first appeared in the Bankruptcy Code in 1952; Congress explained that the amendment "make[s] clear that a trustee in bankruptcy is vested with the title of the bankrupt in property which is located without, as well as within, the United States." H.R. Rep. No. 82-2320, at 15 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1960, 1976. Thus, "property of the estate" includes both foreign and domestic property.

Section 541 defines "property of the estate" as, *inter alia*, all "interests of the debtor in property." 11 U.S.C. § 541(a)(1). In turn, § 548 allows the avoidance of certain transfers of such "interest[s] of the debtor in

property." 11 U.S.C. § 548(a)(1). By incorporating the language of § 541 to define what property a trustee may recover under his avoidance powers, § 548 plainly allows a trustee to avoid any transfer of property that *would have been* "property of the estate" prior to the transfer in question — as defined by § 541 — even if that property is not "property of the estate" *now*.[2] *Cf. Begier v. IRS*, 496 U.S. 53, 58, 59 n.3 (1990) (reaching a similar conclusion about another avoidance provision, § 547 of the Bankruptcy Code); *Cullen Ctr. Bank & Trust v. Hensley*

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[2] The circuits are divided as to whether "property of the estate" encompasses property that a debtor has fraudulently transferred. If it does — as the Fifth Circuit has held, *see Cullen Ctr. Bank & Trust v. Hensley (In re Criswell)*, 102 F.3d 1411, 1417 (5th Cir. 1997); *Am. Nat'l Bank v. MortgageAmerica Corp. (In re MortgageAmera Corp.)*, 714 F.2d 1266, 1275 (5th Cir. 1983) — then the Bahamian property here falls squarely within § 541's definition of "property of the estate," and that provision's clear incorporation of foreign property would obviously rebut the presumption against extraterritoriality. However, not every court has agreed with the Fifth Circuit's conclusion that "property of the estate" includes property that could be, but has not yet been, recovered as the object of a fraudulent transfer. Instead, other courts have concluded that property held by third-party transferees only becomes "property of the estate" *after* it has been avoided and recovered. *See In re Saunders*, 101 B.R. 303, 304-05 (Bankr. N.D. Fla. 1989); *see also FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 131 (2d Cir. 1992); *Dunes Hotel Assocs. v. Hyatt Corp.*, 245 B.R. 492, 504-05 (D.S.C. 2000). Because we hold that § 548 applies to the transfer in this case even assuming that § 541's definition of "property of the estate" does not by itself extend to the Bahamian property, we need not join this dispute.

(In re Criswell), 102 F.3d 1411, 1416 (5th Cir. 1997) ("These § 541 'property of the estate' definitions have been directly linked with the term 'interest of the debtor in property' under § 547(b)."). Through this incorporation, Congress made manifest its intent that § 548 apply to all property that, absent a prepetition transfer, would have been property of the estate, wherever that property is located.

This interpretation fully accords with the purpose of the Bankruptcy Code's avoidance provisions, which is to prevent debtors from illegitimately disposing of property that should be available to their creditors. *See Palmer & Palmer, P.C. v. U.S. Tr. (In re Hargis)*, 887 F.2d 77, 79 (5th Cir. 1989) (avoidance provisions "protect[ ] the rights of creditors via protection of the bankruptcy estate"); *see also* Unif. Fraudulent Transfer Act § 3 comm. 2, 7A U.L.A. 295 (1984) ("[T]he purpose of the Act [is] to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors").

In furtherance of this purpose, Congress provided that creditors are entitled to the "interests of the debtor in property" under § 541 — expressly including all property "wherever located" — and that they may avoid a debtor's fraudulent transfer of the same "interest[s] of the debtor in property" under § 548. Congress thus demonstrated an affirmative intention to allow avoidance of transfers of foreign property that, but for a fraudulent transfer, would have been property of the debtor's estate. Therefore, the presumption against extraterritoriality does not prevent application of § 548 here.

IV.

The transferees argue, however, that even if the presumption against extraterritoriality does not prevent extension of § 548 to the transaction here, we should

nevertheless refrain from applying the statute under the doctrine of international comity. In particular, they emphasize that disputes concerning real property should be governed by the law of the situs — here, Bahamian law. We disagree. Even if the elements of this transfer do not conclusively render it domestic rather than extraterritorial, a consideration of all the important components of the transfer certainly compels the conclusion that application of the United States Bankruptcy Code is appropriate here.

International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Although there is some dispute as to the precise contours of this doctrine — *compare Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993), *with id.* at 813 (Scalia, J., dissenting) — at base comity involves the recognition that there are circumstances in which the application of foreign law may be more appropriate than the application of our own law. In this case, the transferees maintain that application of Bahamian bankruptcy law, which (according to them) only allows avoidance if there is proof of an actual intent to defraud, is more appropriate than application of § 548, which allows avoidance of constructively fraudulent transfers like the one at issue here.

In deciding whether to forego application of our own law under the doctrine of international comity, the Supreme Court has referred to the factors in Restatement (Third) of Foreign Relations Law § 403 (1987). *See Hartford Fire Ins.*, 509 U.S. at 799 & n.25; *id.* at 818 (Scalia, J., dissenting); *see also Maxwell Commc'n Corp. PLC v. Societe Generale PLC (In re Maxwell Commc'n*

Corp.), 93 F.3d 1036, 1047-48 (2d Cir. 1996) [hereinafter *Maxwell III*]. The Restatement looks to, *inter alia*, "the extent to which the activity takes place within the territory" of the regulating state, "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated," "the extent to which other states regulate such activities" or "may have an interest in regulating [them]," the "likelihood of conflict with regulation by another state," and "the importance of regulation to the regulating state." Restatement (Third), *supra*, § 403(2). Applying those factors, we can only conclude that the doctrine of international comity does not require that we forego application of the United States Bankruptcy Code in favor of Bahamian bankruptcy law.

The strongest argument in favor of applying Bahamian law is that this case involves real property, which (the transferees argue) should be governed by the law of the situs. When a case involves the definition of property interests, principles of international comity may, in some cases, counsel courts to employ the property law of the situs to resolve those interests, notwithstanding other comity factors. *See Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag, Controle et Revision S.A.)*, 961 F.2d 341, 349 (2d Cir. 1992).[3] But

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[3] The transferees' citation to *Kojima v. Grandote Int'l L.L.C. (In re Grandote Country Club Co., Ltd.)*, 252 F.3d 1146 (10th Cir. 2001), does not support their contention that there is a *per se* rule that the law of the situs governs questions of fraudulent transfers. In that case, the trustee in a Japanese bankruptcy proceeding brought an ancillary proceeding in Colorado to avoid an allegedly fraudulent transfer of Colorado real property that had been made in Colorado. The Tenth Circuit held that Colorado law rather than Japanese law should determine

analogous modern choice-of-law principles recognize that the law of the situs does not necessarily govern "the allocation of interests in land [between] . . . debtor and creditor" if "regulation of the relationship is of greater concern to a state other than the situs." Restatement (Second) of Conflict of Laws ch. 9, topic 2, introductory note. This is "particularly" true "when the land is part of an aggregate of property which it is desirable to deal with as a unit." *Id.* Both of these factors are present in this case. The real property at issue is part of an aggregate — the bankruptcy debtor's estate — that is most desirably dealt with as a whole. *Cf. Katz*, 546 U.S. ___, 2006 WL 151985, at *10 (noting that the origins of the Bankruptcy Clause and the earliest bankruptcy legislation enacted by Congress show that "the Framers' primary goal was to prevent competing sovereigns' interference with the debtor's discharge"). Furthermore, the United States has a stronger interest than the Bahamas in regulating this transaction. The purpose of the United States Bankruptcy Code is to protect the rights of both debtors and creditors during insolvency. *See Philips v. Congelton, L.L.C. (In re White Mountain Mining Co.)*, 403 F.3d 164, 169 (4th Cir. 2005) (quoting 1 *Collier on Bankruptcy* ¶ 3.02[2] (15th ed. rev. 2005)). The Code protects debtors by providing them a fresh start. *See Foley & Lardner v. Biondo (In re Biondo)*, 180 F.3d 126, 130 (4th Cir. 1999). In exchange, the Code's avoidance provisions protect creditors by preserving the bankruptcy estate against illegitimate depletions. *See Hargis*, 887 F.2d at 79. The

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the fraudulence of the transfer. *Id.* at 1150. But the transfer at issue in *Grandote* was no ordinary transfer; rather, it was so deeply enmeshed with Colorado tax law that the Tenth Circuit deemed the transfer to have been made by the state of Colorado, not by the debtor. *Id.* at 1148-49, 1151-52. Colorado thus had a much stronger connection to the property in question, justifying the application of local law.

United States has a strong interest in extending these personal protections to its residents — including the vast majority of the interested parties here. The Bahamas, by contrast, has comparatively little interest in protecting nonresidents. *Cf. Hurtado v. Superior Court*, 522 P.2d 666, 670 (Cal. 1974) (holding that Mexico has no interest in applying its statutory limitation on damages when defendants in a tort action were not Mexican residents). Thus, applying Bahamian law here would undercut the purpose of the United States Bankruptcy Code by withdrawing its protections from those it is intended to cover, while simultaneously failing to protect any Bahamian residents.

Several other factors make application of United States law more appropriate. Most of the activity surrounding this transfer took place in the United States. Moreover, almost all of the parties with an interest in this litigation — the debtor, the transferees, and all but one of the creditors — are based in the United States, and have been for years. *Compare Maxwell III*, 93 F.3d at 1051 (deference to British law is appropriate when all of the parties were British). Certainly, Mrs. French, "the person principally responsible for the activity to be regulated," has a strong connection to this country as a long-time United States resident. Finally, there are no parallel insolvency proceedings taking place in the Bahamas. There is thus no danger that the avoidance law of the regulating state — the United States — will in fact conflict with Bahamian avoidance law. *See Simon*, 153 F.3d at 999. Accordingly, we find that the many contacts between this fraudulent transfer and the United States justify the application of United States rather than Bahamian law.

V.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

WILKINSON, Circuit Judge, concurring:

The unique properties of bankruptcy law compel an affirmance of the district court. The bankruptcy laws provide an integrated scheme for gathering and disbursing the assets of a debtor's estate. *See, e.g., Grady v. A.H. Robins Co.*, 839 F.2d 198, 202 (4th Cir. 1988). The Code anticipates that this will take place within a single proceeding, rather than asset by asset in inefficient piecemeal litigation. Indeed, a major purpose of the Bankruptcy Code is to forestall "a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." *Underwood v. Hilliard* (*In re Rimsat, Ltd.*), 98 F.3d 956, 961 (7th Cir. 1996) (internal quotation marks omitted); *see also* 5 *Collier on Bankruptcy* ¶ 541.01 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005) (explaining that the "central aggregation of property . . . promotes the effectuation of the fundamental purposes of the Bankruptcy Code"). Ease and centrality of administration are thus foundational characteristics of bankruptcy law.

For these reasons, Congress has broadly defined property of the estate as property "wherever located and by whomever held." 11 U.S.C. § 541(a) (2000). This broad definition reflects congressional support for the Code's extraterritorial application in appropriate circumstances. *See Hong Kong & Shanghai Banking Corp. v. Simon* (*In re Simon*), 153 F.3d 991, 996 (9th Cir. 1998). The fraudulent transfer provision, 11 U.S.C. § 548(a) (2000),

is part and parcel of Congress's overarching objective to aggregate assets. Allowing this constructively fraudulent transfer from the debtor to her children would impair the orderly administration of the bankruptcy estate. I can hardly believe, therefore, that Congress wanted us to excise § 548(a) — and this provision alone — from the remainder of the Bankruptcy Code. And it is unlikely that Congress would desire to accord an invariable exemption from the Code's operation to those who leave our borders to engage in fraud. This is particularly true where, as here, the debtor, the transferees, and virtually every creditor are located in the United States.

My colleague's careful opinion leaves intact the Supreme Court's strong presumption against extraterritorial application of congressional statutes. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). Bankruptcy is, in general, materially different from those provisions held not to apply extraterritorially, such as anti-discrimination statutes, *see Aramco*, 499 U.S. at 248 (Title VII); *Reyes-Gaona v. N.C. Growers Ass'n*, 250 F.3d 861, 864-65 (4th Cir. 2001) (Age Discrimination in Employment Act), or hourly wage laws, *see Foley Bros.*, 336 U.S. at 285. In those contexts, ease of administration is not a raison d'être, and congressional intent for extraterritorial application is considerably less clear. *See also* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law* 528 (2003) (noting that courts have treated bankruptcy law with special consideration in the extraterritoriality context). The special context of bankruptcy law, therefore, provides little occasion to set forth general pronouncements on extraterritoriality.

Quite properly, the panel opinion also does not suggest that every portion of the Bankruptcy Code invariably applies to conduct abroad. Instead, it represents a sensitive recognition of the administrative

exigencies that are bound up with the avoidance of this fraudulent transfer. I agree with this view, and I am happy to join in Judge Motz's fine opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

In re: BETTY I. FRENCH Case No. 01-6-3163-JS

* * * * * * * * * * * *

RANDY LEE FRENCH et al.

v. Civil Action No.
WMN-04-1947

GEORGE LIEBMANN, TRUSTEE

[ENTERED: December 8, 2004]

ORDER

In accordance with the foregoing memorandum and for the reasons stated therein, IT IS this 8th day of December, 2004, by the United States District Court for the District of Maryland, ORDERED:

1. That the decision of the Bankruptcy Court avoiding the transfer of real property to Appellants is hereby AFFIRMED;

2. That Civil Action No. WMN-04-1947 is hereby CLOSED; and

3. That the Clerk of the Court shall mail or transmit copies of this Memorandum and Order to all counsel of record.

/s/
William M. Nickerson
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

In re: BETTY I. FRENCH Case No. 01-6-3163-JS

* * * * * * * * * * * *

RANDY LEE FRENCH et al.

v. Civil Action No.
WMN-04-1947

GEORGE LIEBMANN, TRUSTEE

[ENTERED: December 8, 2004]

MEMORANDUM

This is an appeal from a Bankruptcy Court decision under Section 548 of the Bankruptcy Code[4] which avoided as fraudulent the transfer of certain real property located in the Bahamas. The underlying facts are largely uncontested. At issue is the permissible extraterritorial reach of Section 548. Apparently, no other federal court has addressed this specific issue in a reported decision, aside from the decision of Bankruptcy Judge James F. Schneider in this action, Liebmann v. French, 303 B.R. 774 (Bankr. D. Md. 2003).

The facts underlying Judge Schneider's decision follow. The Debtor, Betty I. French, acquired the property in question in November 1976. The Debtor asserts, and this Court accepts for the purposes of this appeal, that she gifted the deed to the real property to her children, Appellants Randy Lee French and Danna Marie French, on December 25, 1981, as a Christmas present. According to Appellants, the Debtor presented this gift to them in

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[4] 11 U.S.C. § 548.

Maryland. The deed was not immediately recorded, however. Appellants assert that substantial Bahamian recording taxes made it undesirable to do so at the time, and that it was their understanding that, under Bahamian law, the transfer was complete, valid, and final upon the delivery of the deed.

In the late 1990s, Appellants' father, Elwood Dean French, began to experience serious financial difficulties. Appellants assert that in response to their father's deteriorating financial condition they determined to record the deed in the Bahamas so that "their ownership of the property would not be adversely affected somehow by Mr. French's financial difficulties." Appellants' Brief at 6. Appellants hired a Bahamian lawyer for that purpose and on June 21, 2000, the deed was duly recorded among the land records of the Bahamas Registrar General.

On October 20, 2000, a creditor filed an involuntary Chapter 7 bankruptcy petition against Appellants' mother. On August 22, 2002, Appellee, as Trustee for the Chapter 7 estate, filed an adversary action under Sections 548 and 550 of the Code to avoid the pre-petition transfer of the Bahamian property and to recover that property or its fair market value for the benefit of the estate. The Trustee alleged that the property was transferred for no consideration, within 12 months of the filing of the bankruptcy petition, and at a time that the Debtor was insolvent and thus, was constructively fraudulent under Section 548(a)(1)(B).[5] In

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[5] Section 548(a)(1)(B) provides that the trustee can avoid any transfer of an interest of the debtor in property that was made within one year prior to the filing of the petition if the debtor "received less than a reasonably equivalent value in exchange for such transfer" and "was insolvent on the date that such transfer was made . . . or became insolvent as a result of such transfer."

the alternative, the Trustee asserted that the transfer was made with the actual intent to defraud the Debtor's creditors and thus, could be avoided under Section 548(a)(1)(A).[6]

With the Complaint, the Trustee filed a motion for a temporary restraining order, preventing Appellants from transferring or encumbering the Bahamian property for a period of ten days. The Bankruptcy Court granted that motion and later issued a preliminary injunction prohibiting the same.

Appellants moved to dismiss the Trustee's claim on three grounds. First, Appellants argued that the transfer took place in 1981 when the deed was gifted to them, regardless of when it was recorded. Second, Appellants asserted that the "presumption against extraterritoriality" barred the application of Section 548 to transfers of real property located outside of the United States. Appellants' third argument was that under principles of "international comity," the Bankruptcy Court should refrain from applying Sections 548 and 550 extraterritorially in this case. The Bankruptcy Court denied the motion, finding that the argument that the transfer actually occurred in 1981 involved a factual dispute inappropriate for resolution on a motion to dismiss. After reviewing decisions of numerous other courts upholding the extraterritorial application of other provisions of the Bankruptcy Code, the Bankruptcy Court held that neither the presumption against

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[6] Section 548(a)(1)(A) provides that the trustee can avoid any transfer of an interest of the debtor in property that was made within one year prior to the filing of the petition if the debtor made such a transfer "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made . . ., indebted."

extraterritoriality nor the doctrine of international comity warranted dismissal under the facts presented.

Shortly thereafter, the Trustee filed a motion for summary judgment. After a hearing, the Bankruptcy Judge granted the motion as to the Trustee's claim of constructively fraudulent transfer. The Court found that under Section 548(d)(1) of the Bankruptcy Code, the transfer of the property occurred in June of 2000.[7] Because there was no dispute that the conveyance was a gift without consideration, and that the Debtor was insolvent at that time, the Bankruptcy Court determined that the conditions for avoidance under Section 548(a)(1)(B) had been met. Because the transfer could be avoided under Section 548(a)(1)(B), the Bankruptcy Court did not reach the merits of Trustee's claim of intentional fraud under Section 548(a)(1)(A).

In this appeal, Appellants contend that the Bankruptcy Court erred in refusing to dismiss the avoidance action under the presumption against extraterritoriality and/or the doctrine of international comity. Because the applicability of the presumption against extraterritoriality is a pure question of law, this Court reviews the decision of the Bankruptcy Court as to that issue de novo. As to whether the Bankruptcy Court should have declined to exercise its jurisdiction over the matter based upon the doctrine of international comity, that question was a matter of that court's discretion which this Court reviews under an abuse of discretion standard. For the reasons that follow, this Court

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[7] That section provides that a transfer does not occur until it is perfected against a bona fide purchaser. Thus, for the purposes of the Bankruptcy Code, the transfer did not take place until the deed was recorded on June 21, 2000.

concludes that the Bankruptcy Court's decision was correct in both regards.

Although it has it roots in some earlier decisions of the Supreme Court,[8] the "presumption against extraterritoriality" was first denominated as such in Equal Employ. Opportunity Commission v. Arabian American Oil Co. (Aramco), 499 U.S. 244 (1991).[9] As explained in Aramco, "[i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" Id. at 248(quoting Foley Bros., 336 U.S. at 285). This presumption against extraterritorial effect is based on the common-sense notion that Congress is "primarily concerned with domestic conditions" when it legislates. Foley Bros., 336 U.S. at 285. Courts are required to assume that Congress acts with knowledge of this presumption and in Aramco, the Supreme Court instructed that unless there is "'the affirmative intention of the Congress clearly expressed,'" courts must conclude that a federal statute does not apply outside the United States. Aramco, 499 U.S. at 248 (quoting Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957)).

While Aramco would seem to require some "clear statement" in the statute itself indicating the congressional intent that the statute be applied extraterritorially, that requirement appears to have been

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[8] See American Banana v. United Fruit Co., 213 U.S. 347 (1909); Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949).

[9] In Aramco, the Court held that Title VII of the Civil Rights Act did not apply to employment activities that took place abroad.

relaxed by the Supreme Court in Smith v. United States, 507 U.S. 197 (1993).[10] Under Smith, there must only be "clear evidence" of congressional intent to apply the statute extraterritorially. 507 U.S. at 204. In discerning congressional intent in the statute at issue in Smith, Chief Justice Rehnquist looked to the overall structure of the act, the legislative history, and other non-textual sources. Id. at 201-03. In another Supreme Court decision issued shortly after Smith, Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993),[11] the Court indicated that it looked at "all available evidence" about the statute in order to discern congressional intent, including the legislative history, the place of the particular provision within the statutory scheme, and the relevance of the statute to the overall body of law of which it was a part, i.e., immigration law. 509 U.S. at 177.

Furthermore, lower courts considering the presumption against extraterritoriality have concluded that where congressional intent concerning extraterritorial application cannot be divined courts can examine additional factors to determine whether the presumption should be disregarded in a particular case. Hong Kong & Shanghai Banking Corp., Ltd. v. Simon (In re Simon), 153 F.3d 991, 995 (9th Cir. 1998). First, "the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States."

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[10] In Smith, the Court held that the presumption against extraterritoriality barred an action under the Federal Tort Claims Act based on conduct that took place in Antarctica.

[11] In Sale, the Court invoked the presumption against extraterritoriality to preclude provisions of the Immigration and Naturalization Act from applying to Haitian refugees apprehended in international waters.

Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993) (citing Steele v. Bulova Watch Co., 344 U.S. 280 (1952)). Second, the presumption is not applicable when the regulated conduct is "intended to, and results in, substantial effects within the United States." Laker Airways, Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 925 (D.C. Cir. 1984).

While prior to Judge Schneider's opinion in this action, no reported decision has applied these principles in the context of Section 548 of the Bankruptcy Code, courts have upheld the extraterritorial application of numerous other Code provisions, as noted by Judge Schneider. For example, in Simon, the Ninth Circuit concluded that a violation of a Section 524 discharge injunction by a foreign creditor outside the United States was sanctionable by a United States Bankruptcy Court. 153 F.3d at 995-96. In Nakash v. Zur (In Re Nakash), 190 B.R. 763 (Bankr. S.D.N.Y. 1996), the court held that the automatic stay of Section 362 should be given extraterritorial application so as to protect a debtor from a receiver's filing of an insolvency proceeding against it in Israel. In In re Dow Corning Corp., 287 B.R. 396 (E.D. Mich. 2002), the district court held that the Code's prohibition of post-confirmation litigation against a reorganized debtor applied equally to litigation initiated abroad.

The fundamental framework of the Bankruptcy Code compels these results. As the Seventh Circuit noted in upholding the application of the Code's automatic stay provision to halt an action instituted by the receiver of a debtor in the Federation of St. Kitts and Nevis, "the efficacy of the bankruptcy proceeding depends on the [bankruptcy] court's ability to control and marshal the assets of the debtor wherever located." Underwood v. Hilliard (In re Rimsat, Ltd.), 98 F.3d 956, 961 (7th Cir. 1996). This ability is specifically provided for in the

Code's delineation of the scope of the debtor's estate: "the estate is comprised of the debtor's legal or equitable interests in property 'wherever located and by whomever held.'" In re Simon, 153 F.3d 996 (quoting 11 U.S.C. § 541(a), emphasis supplied in Simon). As commentators have aptly observed, "the Bankruptcy Code was drafted with the realization that the Code's key provisions would be applied extraterritorially when needed to effectuate its principal goals of asset preservation and equitable distribution of the same to holders of allowed claims." David M. Green and Walter Benzija, "Spanning the Globe: The Intended Extraterritorial Reach of the Bankruptcy Code," 10 Am. Bankr. Inst. L. Rev. 85, 93 (Spring, 2002).

In this action, a Maryland debtor gave a deed to her son and daughter residing in Maryland and Virginia, respectively. The gift, according to Appellants, was made in Maryland. There is no dispute that had the deed related to real property located within the borders of the United States, the Bankruptcy Court could properly avoid the gift and return the property to the Debtor's estate for the benefit of the creditors. Given the clear congressional intent expressed in the Bankruptcy Code that property of a debtor be treated the same whether located here or abroad, the Court can find no principled reason to reach a different result as to property subject to a pre-petition transfer avoidance action. The identical concerns for marshaling and equitably distributing assets for the benefit of creditors are implicated.

Here, as they did before the Bankruptcy Court, Appellants rely heavily on a series of decisions related to the extraterritorial application of the Code's preferential transfer provision in Section 547. See In re Maxwell Communications Corp., 170 B.R. 800 (Bankr. S.D.N.Y. 1994), aff'd, 186 B.R. 807 (S.D.N.Y. 1995), aff'd, 93 F.3d 1036 (2nd Cir. 1996). In that action, Bankruptcy Judge

Tina Brozman concluded that Congress did not intend for Section 547 to be applied extraterritorially. As an alternative holding, she concluded that the avoidance actions before her should be dismissed under principles of international comity. The district court affirmed on both grounds. The Second Circuit, however, did not reach the question as to whether the Code's preference provisions could be applied extraterritorially, affirming instead only on the comity ground.

In a law review article that this Court finds particularly enlightening, the bankruptcy court's decision in Maxwell received some criticism. See Suzanne Harrison, "The Extraterritoriality of the Bankruptcy Code: Will the Borders Contain the Code?," 12 Bankr. Dev. J. 809 (1996). That article, written before the Second Circuit issued its decision, anticipated the result on appeal and suggested that the lower courts should have limited their consideration to the issue of comity. Id. at 843. The author suggested, and this Court agrees, that lower courts' presumption of extraterritoriality analysis would have benefitted from examining congressional intent in the context of the Code as a whole instead of the specific provision in isolation. Courts should "interpret each section in such a fashion as 'to preserve an overall sense and design, in light of the policies sought to be achieved.'" Id. at 831 (quoting Hill v. Spencer Savings & Loan Ass'n (In Re Bevill), 83 B.R. 880, 887-88 (D.N.J. 1988)).

In a subsequent decision, Judge Brozman limited her earlier holding in Maxwell. See Interbulk Ltd. v. Louis Dreyfus Corp. (In re Interbulk, Ltd.), 240 B.R. 195 (Bankr. S.D.N.Y. 1999). In Interbulk, a chapter 11 trustee sought to avoid, under Section 547, an attachment that a creditor had obtained from a French court a few weeks before the debtor filed its bankruptcy petition. When the creditor attempted to rely on the

series of decisions in Maxwell "as the linchpin for its argument that there is a presumption against the extraterritorial application of United States preference laws," Judge Brozman responded:

> What [the creditor] fails to realize is that there are critical distinctions between the facts of Maxwell and those present here.
>
> In Maxwell, there were parallel bankruptcy proceedings in England and the United States for the debtor, an English corporation. The joint administrators appointed by the high court in London and the examiner appointed by this court entered into a procedural protocol (the "Protocol") to coordinate their efforts to administer the two cases as a single estate. The Protocol provided for the creation of a single pool of assets in which creditors from both countries could share by filing claims in either jurisdiction. Three foreign (to the United States) creditors (the "Creditors") had received transfers overseas from the debtor within 90 days of the debtor's bankruptcy filings. All three filed claims in England, but not here. Cognizant that the administrators contemplated suit in the United States to recover the preferences from them, the Creditors sought unsuccessfully, in England, to enjoin the administrators from commencing suit under section 547 of the Code. The administrators then filed adversary complaints in this court to recover the transfers from the Creditors. The Creditors promptly moved for dismissal, pursuant to

> Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief could be granted. The Creditors argued that the transfers were extraterritorial in nature and considerations of comity prevented the use of section 547 to avoid them. I concluded that section 547 was not meant by Congress to apply extraterritorially and that inasmuch as the center of gravity of these transfers was indeed extraterritorial, they could not be avoided. I alternatively concluded that principles of international comity dictated tht the avoidance actions had to be dismissed.

Interbulk, 240 B.R. at 198-99.

Like Interbulk, the instant case is readily distinguishable from Maxwell on its facts. Here, there is no international aspect to the transaction at issue other than the happenstance that the property represented by the deed is in the Bahamas. To the extent that this Court's conclusion is at odds with the legal conclusion of the lower courts in Maxwell, this Court respectfully disagrees with those holdings.

Aside from their reliance on the Maxwell decisions, Appellants' primary argument for the conclusion that Judge Schneider erred is premised on the observation that Bahamas property was not actually property of the estate until after the transfer was avoided. Appellants note that several of the cases relied upon by the court below that applied the Bankruptcy Code extraterritorially did so under the legal fiction that, because bankruptcy court's have constructive possession over estate property, the foreign property is "legally" located within the jurisdictional boundaries of the court, regardless of its actual location. See, e.g., Simon, 153 F.3d

at 996. By constructively locating the foreign property within domestic borders, a court can avoid directly confronting the presumption against extraterritoriality.

Appellants are correct that Judge Schneider appears to have based his decision, at least in part, on a finding that the Bahamas property was property of the estate. See 303 B.R. at 783 ("Regardless of the fact that the land in question is located in the Bahamas, it is property of the estate within the subject matter jurisdiction of this Court pursuant to Section 541(a)."). Appellants are also correct that this conclusion would be at odds with a substantial body of case law, including a decision of Judge Schneider, that holds that property recovered by the trustee pursuant to his avoidance powers is not property of the estate until it is actually recovered. See In re Murray, 214 B.R. 271 (Bankr. D. Mass. 1997); In re Yellow Cab Co-op. Ass'n, 178 B.R. 265 (Bankr. D. Colo. 1995); In re Saunders, 101 B.R. 303 (Bankr. N. D. Fla. 1989); see also Allnutt v. Friedman (In Re Allnutt), 1995 U.S. Dist. Lexis 4870 (D. Md. 1995) (affirming decision of Judge Schneider). The conclusion that the real property was not property of the estate, however, does not alter this Court's conclusion as to the non-applicability of the presumption. Confronting the presumption head on, this Court finds that "all available evidence" demonstrates that Congress did intend for the key provisions of the Bankruptcy Code to be applied extraterritorially for the reasons stated above.

In the alternative, even if one concluded that the evidence of congressional intent was less than compelling, the Court finds that the so-called Massey exceptions referenced above would compel the Court to disregard the presumption in this instance. Allowing a debtor to defraud creditors, whether constructively or intentionally, by giving away significant foreign assets to family members, would undoubtedly "result in adverse

effects within the United States." Massey, 986 F.2d at 531. In the context of increasing globalization, to not apply Section 548 extraterritorially would provide the potential to deprive creditors of significant assets merely on the happenstance that they had been cached overseas.

Turning to Appellants' argument based on principles of "international comity," this Court finds even less support. International comity is defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 164 (1895). International comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." Id. at 163. Appellants acknowledge that comity is typically invoked where there are competing proceedings in two countries and further acknowledge that, in this instance, there are no legal proceedings in the Bahamas that would conflict with the bankruptcy action here.

Instead, Appellants rely on a second aspect of international comity that was laid out by Justice Scalia in a dissenting opinion in Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993), one that does not arise out of conflicting proceedings. As summarized by Justice Scalia, this principle provides that "a nation having some 'basis' for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction 'with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.'" Id. at 818 (quoting Restatement (Third) of Foreign Relations Law of the United States § 403(1)). Whether the exercise of jurisdiction in a specific context is

reasonable turns on a number of factors including, inter alia:

> the extent to which the activity takes place within the territory [of the regulating state],
>
> the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated,
>
> the character of the activity to be regulated,
>
> the importance of regulation to the regulating state,
>
> the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted,
>
> the extent to which another state may have an interest in regulating the activity, and
>
> the likelihood of conflict with regulation by another state.

Id., 509 U.S. at 818-19 (citations omitted). Furthermore, in discussing international comity in the context of a bankruptcy action, the Ninth Circuit in Simon has added, "[i]f any philosophy can be attributed to the structure of the Code it is that of deference to the country where the primary insolvency proceeding is located, including the United States if the plenary proceeding is located here,

and flexible cooperation in the administration of assets." Simon, 153 F.3d at 998.

The activity at issue here is the transfer of property. While the property transferred may be located in the Bahamas, the transfer took place in Maryland. The only individuals with any relationship to, interest in, or potential interest in the property - the debtor, the trustee, the Appellants, and the creditors – are all residents of the United States. No Bahamian individual or entity has any stake in the determination of ownership in the property. Under these circumstances, the Bankruptcy Court did not err in finding international comity concerns insufficient to compel it to withhold action.

Accordingly, the decision of the Bankruptcy Court will be affirmed. A separate order will issue.

/s/
William M. Nickerson
Senior United States District Judge

Dated: December , 2004

SO ORDERED

Date signed April 21, 2004

/s/ James F. Schneider
JAMES F. SCHNEIDER
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

In re:

BETTY I. FRENCH Case No. 00-6-3163-JS

Debtor Chapter 7

* * * * * * * * * * * *

GEORGE W. LIEBMANN,

Trustee Adv. Pro. No. 02-5757-JS

v.

RANDY LEE FRENCH
and
DONNA MARIE SHAKA,

Defendants

[ENTERED: April 21, 2004]

ORDER GRANTING THE TRUSTEE'S MOTION FOR SUMMARY JUDGMENT AND AVOIDING FRAUDULENT TRANSFER

Based upon the memorandum Opinion filed simultaneously herewith, the motion for summary

judgment filed by George W. Liebmann, Chapter 7 trustee, is hereby GRANTED and the transfer of property identified as "Lot No. 5 of the subdivision called and known as Love Estates in the Bambier District of the City of Nassau on the Island of New Providence, one of the islands of the Commonwealth of the Bahamas," from the debtor, Betty Irene French, to the defendants, Randy Lee French and Donna Marie Shaka, by deed recorded among the Land Records of the Bahama Islands on June 21, 2000, is hereby AVOIDED and RECOVERED by the trustee on behalf of the debtor's estate as a constructively fraudulent transfer.

SO ORDERED.

END OF ORDER

Date signed April 21, 2004

/s/ James F. Schneider
JAMES F. SCHNEIDER
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

In re:

BETTY I. FRENCH Case No. 00-6-3163-JS

Debtor Chapter 7

* * * * * * * * * * * *

GEORGE W. LIEBMANN,

Trustee Adv. Pro. No. 02-5757-JS

v.
RANDY LEE FRENCH
and
DONNA MARIE SHAKA,

Defendants

[ENTERED: April 21, 2004]

MEMORANDUM OPINION GRANTING THE TRUSTEE'S MOTION FOR SUMMARY JUDGMENT AND A VOIDING FRAUDULENT TRANSFER

On February 11, 2004, the trustee's motion for summary judgment came on for hearing. For the reasons set forth, the motion will be granted.

FINDINGS OF FACT

On July 13, 1999, the Peninsula Bank ("Bank") obtained a judgment in the amount of $3 97,425.10, against Betty Irene French ("debtor") in the Circuit Court for Wicomico County, Maryland. On October 20, 2000, the Bank filed the instant involuntary Chapter 7 bankruptcy petition in this Court against the debtor. On January 29, 2001, an order for relief was entered. On February 11, 2001, the debtor filed her schedules under penalty of perjury and swore that her assets had not diminished significantly during the year before the petition was filed.[1]

On August 22, 2002, George W. Liebmann, the Chapter 7 trustee, filed the instant complaint to avoid and recover an alleged fraudulent transfer of real property[2] in the Bahama Islands, made by the debtor to her son and daughter, the defendants Randy French ("Randy") and Donna Shaka ("Donna"), for no consideration within one year of the filing of the petition. The verified complaint alleged that the debtor did not list the property in her schedules or disclose its existence in her Statement of Financial Affairs. It further alleged that the property was purchased by the debtor and titled in

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[1] In the debtor's Statement of Financial Affairs [P. 24], she stated under penalty of perjury that during one year before bankruptcy she made no payments to insiders, she suffered no losses from fire, theft, other casualty or gambling, no garnishment or seizure of assets, no repossession of assets or returns, that she made no large gifts or charitable contributions and no transfers of assets outside the ordinary course.

[2] The property was identified in the complaint as "Lot No. 5 of the subdivision called and known as Love Estates in the Bambier District of the City of Nassau on the Island of New Providence, one of the islands of the Commonwealth of the Bahamas." Complaint, ¶ 11.

her name by deed dated November 11, 1976, and recorded in the Bahamas; and that she transferred the property to the defendants by deed dated December 25, 1981, but that the deed was not recorded among the Bahamian land records until June 21,2000.[3]

The trustee also filed a motion [P. 2] for temporary restraining order ("TRO"), which this Court granted by order [P. 3] entered August 26, 2002. The TRO prohibited the defendants from transferring or encumbering the Bahamian property for a period often days. On September 4, 2002, Judge E. Stephen Derby granted the plaintiffs request for a preliminary injunction [P. 7],

CONCLUSIONS OF LAW

Summary judgment is appropriate when (1) the pleadings, depositions, answers to interrogatories, admissions on file and affidavits show that there is no genuine issue of material fact; and 2) the moving party is entitled to judgment as a matter of law. In determining the facts for summary judgment purposes, the Court may rely upon affidavits made with personal knowledge that set forth specific facts otherwise admissible in evidence and sworn or certified copies of papers attached to such affidavits. Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; *Bailey v. Blue Cross & Blue Shield of Virginia,* 67 F.2d 53, 56 (4th Cir. 1995); *Miller* v. *FDIC,* 906 F.2d 972, 973 (4th Cir. 1990). Permissible inferences to be drawn from the underlying facts are viewed in the light most favorable to the nonmoving party. *Miller,* 906 F.2d at 973-74 (4th Cir. 1990) *(citing Matsushita Elec. Indus. Co.,*

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[3] The Court has previously determined that the instant complaint to recover property of the estate located in the Bahamas does not implicate an extraterritorial application of the Bankruptcy Code. *Liebmann* v. *French (In re French),* 303 B.R. 774 (Bankr. D. Md. 2003).

Ltd. v. *Zenith Radio Corp.*, 475 U.S. 574, 587-88, 206 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 553 (1986)). In the instant case, all of the facts and inferences therefrom have been construed in a light most favorable to the defendants.

The undisputed facts here present qualify this transfer as constructively fraudulent. 11 U.S.C. § 548(a)(l)(B).[4] In order to obtain summary judgment on the complaint, the trustee must demonstrate without dispute that the transfer of the subject property was made within one year of the filing of the debtor's bankruptcy petition for less than reasonably equivalent value while the debtor was insolvent. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 535, 114 S. Ct. 1757, 1760, 128 L. Ed. 2d 556 (1994); *Tavenner v. Smoot*, 257 F.3d 401, 408-09 (4th Cir.

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[4] Section 548(a)(l)(B) provides as follows:

> **§ 548. Fraudulent transfers and obligations.**
>
> (a)(l) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of filing of the petition if the debtor voluntarily or involuntarily -
>
> (B)(I) received less than a reasonable equivalent value in exchange for such transfer or obligation;
>
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation[.]

Id.

2001); *Harman* v. *First American Bank of Maryland (In re Jeffrey Bigelow Design Group, Inc.),* 956 F.2d 479, 484-85 (4th Cir. 1992); *Koch v. Rogers (In re Broumas),* 203 B.R. 385, 393 (D. Md. 1996). Constructive fraud does not require proof of actual fraudulent intent. *Balaber-Strauss v. Sixty-Five Brokers (In re Churchill Mortgage Investment Corp.),* 256 B.R. 664, 667 (Bankr. S.D.N.Y. 2000) ("If actual intent to defraud creditors cannot be proved under Section 548(a)(l)(A), a transfer may be avoided under a theory of constructive fraud.").

While the Court accepts the defendants' contention for purposes of ruling on summary judgment that the property was given to the defendants by deed of gift on December 25, 1981, the gift was not a matter of public record until June 21, 2000, when the deed was recorded. The debtor admitted in her deposition that she continued to visit and reside in the property after she made the gift and that she kept some personal belongings there. Deposition, 14-16, Exhibit 2 of Plaintiff s Ex Parte Motion for Temporary Restraining Order [P. 2].

Section 548(d)(l) of the Bankruptcy Code, which determines when a transfer occurs, provides that a transfer does not take place until it is perfected against a *bona fide* purchaser. In this case, therefore, the transfer occurred on June 21, 2000, when the deed to the property was recorded by the defendants.[5] Because the transfer occurred a mere five months before the debtor's

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[5] "This comports with Section 548(d)(1) of the Bankruptcy Code, which provides that a transfer occurs 'when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of

involuntary petition was filed, the transfer occurred within the one year requirement of Section 548(a)(l).

The undisputed facts also demonstrate that the debtor received less than reasonably equivalent value in exchange for the transfer. The debtor acknowledged that the transfer was by deed of gift. Randy also testified to that effect. Donna did not dispute the testimony of the debtor or Randy that the transfer was by deed of gift.

Finally, there is no genuine dispute as to the material fact that the debtor was insolvent at the time of the transfer. Her schedules filed under penalty of perjury on February 11, 2001, less than one year after the conveyance took place, clearly demonstrate the fact of her insolvency. They reflect assets totaling $220,950, compared with liabilities of $2,940,175.35 [P.21]. The gross difference between the debtor's assets and liabilities with no reported change of circumstances in the year before bankruptcy leads to the inescapable conclusion that she was insolvent on June 21, 2000, the date of the transfer. "Where a debtor is shown to be insolvent at a date subsequent to a particular transfer and the debtor's condition did not change during the interim period, it is logical and permissible to presume that the debtor was insolvent as the time of the transfer." *Grant v. Davis (In re Damason Constr. Corp.),* 101 B.R. 775, 778 (Bankr. M.D. Fla. 1989), *citing Foley v. Briden (In re Arrowhead Gardens, Inc.),* 32 B.R. 296 (Bankr. D. Mass. 1983). The fact is undisputed that the debtor reported that she suffered no diminution of assets during the year prior to bankruptcy. Therefore, the Bank's judgment alone probably rendered her insolvent as early as July 13,1999, well before the date of transfer.

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the case, such transfer is made immediately before the date of the filing of the petition.' 11 U.S.C. § 548 (d)(l)." *Liebmann,* 303 B.R. 774, 777 (2003).

Because the record supports the finding that the transfer was constructively fraudulent, it is unnecessary to address the other grounds raised in the complaint.

WHEREFORE, the trustee's motion for summary judgment will be GRANTED and the subject transfer will be AVOIDED and RECOVERED by the trustee.

ORDER ACCORDINGLY.

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Baltimore, Maryland 21201

SO ORDERED

[ENTERED: OCTOBER 8, 2003]

Date signed October 07, 2003

/s/ James F. Schneider
JAMES F. SCHNEIDER
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

In re:

BETTY I. FRENCH Case No. 00-6-3163-JS

Debtor Chapter 7

* * * * * * * * * * * * *

GEORGE W. LIEBMANN,

Trustee Adv. Pro. No. 02-5757-JS

v.

RANDY LEE FRENCH
and
DONNA MARIE SHAKA,

Defendants

ORDER DENYING THE DEFENDANTS' MOTION TO DISMISS

Based upon the memorandum opinion filed simultaneously herewith, the defendants' motion to dismiss is hereby DENIED.

END OF ORDER

cc: Orbie R. Shively, Esquire
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In re: BETTY IRENE FRENCH, Debtor; GEORGE W. LIEBMANN, Trustee v. RANDY LEE FRENCH and DONNA MARIE SHAKA, Defendants

Case No. 00-63163-JS, Chapter 7, Adv. Pro. No. 02-5757-JS

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND

303 B.R. 774; 2003 Bankr. LEXIS 1813

October 7, 2003, Decided

[ENTERED: OCTOBER 8, 2003]

DISPOSITION: [**1] Defendants' motion to dismiss denied.

LexisNexis(R) Headnotes

COUNSEL: For Chapter 7 Trustee: Orbie R. Shively, Esquire, George W. Liebmann, Esquire, Liebmann and Shively, Baltimore, MD.

George W. Liebmann, Esquire, Plaintiff and Chapter 7 Trustee, Liebmann and Shively, Baltimore, Maryland.

For Defendants: Stanton J. Levinson, Esquire, Silver Spring, Maryland.

JUDGES: JAMES F. SCHNEIDER, U.S. BANKRUPTCY JUDGE.

OPINION BY: JAMES F. SCHNEIDER

OPINION: [*775]

MEMORANDUM OPINION DENYING THE DEFENDANTS' MOTION TO DISMISS

This matter is before the Court upon the defendants' motion to dismiss the trustee's complaint to recover fraudulently transferred estate property. For the reasons set forth, the motion will be denied.

FINDINGS OF FACT

On October 20, 2000, the Peninsula Bank filed the instant involuntary Chapter 7 bankruptcy petition in this Court against the debtor, Betty Irene French. On January 29, 2001, an order for relief was entered.

On August 22, 2002, George W. Liebmann, the Chapter 7 trustee, filed the instant complaint to avoid and recover an alleged fraudulent transfer made by the debtor to her son, Randy French, and her daughter, Donna Shaka, of certain [**2] real property located in Nassau in the Bahama Islands for no consideration within 12 [*776] months of the filing of the petition. The verified complaint alleged that the debtor did not list the property in her schedules or disclose its existence in her Statement of Affairs which she filed in her bankruptcy case. It further alleged that the property was purchased by the debtor and titled in her name by deed dated November 11, 1976, and recorded in the Bahamas; that she deeded the property to the defendants by deed dated December 1981 but not recorded in the Bahamian land records until June 21, 2000.

The trustee also filed a motion [P. 2] for temporary restraining order ("TRO"), which this Court granted by order [P. 3] entered August 26, 2002. The TRO prohibited the defendants from transferring or encumbering the Bahamian property for a period often days. On

September 4, 2002, Judge E. Stephen Derby granted the plaintiffs request for a preliminary injunction [P. 7].

On October 10, 2002, the defendants filed the instant motion to dismiss [P. 9]. The motion was premised upon two legal arguments. First, that the transfer in question occurred upon the date the unrecorded deed was executed, [**3] namely, December 1981, well outside the one-year period authorized for the recovery of fraudulent conveyances. Second, that *Sections 548 and 550* of the Bankruptcy Code n1 [*777] providing for the recovery of fraudulent transfers, do not apply to property located outside the borders of the United States, citing *Maxwell Communication Corp.* v. *Barclays Bank (In re Maxwell Communication Corp.), 170 B.R. 800 (Bankr, S.D. N.Y. 1994), aff'd, 186 B.R. 807 (S.D.N.Y. 1995), aff'd, 93 F.3d 1036 (2d Cir. 1996),* and principles of International comity.

> n1 *Section 548(a)* provides, as follows:
>
> *§ 548.* **Fraudulent transfers and** obligations.
>
> (A)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily-
>
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after

the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business.or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

11 U.S.C. § 548(a).

Section 550 of the Code provides, as follows:

***§ 550.* Liability of transferee of avoided transfer**

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided, under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from- -

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from- -

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the Sling of the petition- -

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider;

the trustee may not recover under subsection (a) from a transferee that is not an insider.

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of- -

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized *by* or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes- -

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of- -

> (1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or
>
> (2) the time the case is closed or dismissed.
>
> *11 U.S.C. § 550.*

[**4]

They also cited the case of *Kojima* v. *Grandote Intern., LLC (In re Grandote Country Club Co., Ltd.), 252 F.3d 1146 (8th Cir. 2001),* for the proposition that foreign law can never apply to property located in another country.

The defendants claim that there are no cases standing for the proposition that *Sections 547 and 548* may be applied outside the United States to permit a trustee to recover property.

CONCLUSIONS OF LAW

To the extent that the motion to dismiss contests the date of the transfer, it must fail. "When ruling upon a motion to dismiss a complaint for failure to state a claim for which relief can be granted pursuant to Federal *Rule 12(b)(6),* the Court must accept as true all well-pleaded allegations in the complaint, including all reasonable inferences that may be drawn from them, in the light most favorable to the plaintiff." *Hemelt v. Pontier (In re Pontier), 165 B.R. 797, 798 (Bankr. D. Md. 1994).* As stated in the complaint, the transfer in this case occurred on June 21, 2000, when the deed to the property was recorded among the Bahamian land records by the defendants. This comports with *Section 548(d)(1) of the Bankruptcy* [**5] *Code,* which provides that a transfer

occurs "when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition."

The motion to dismiss could be denied without even addressing the extraterritoriality of the Bankruptcy Code, because the complaint does not allege that the transfer occurred outside this country, which the motion to dismiss assumes. Nevertheless, to the extent that the avoidance of the transfer at issue requires [*778] a discussion of extraterritoriality, it is rioted that the extraterritorial application of the Bankruptcy Code has been upheld in the context of the discharge injunction of *Section 524,* the worldwide effect of the automatic stay of *Section 362,* and the prohibition against litigation against a reorganized debtor after confirmation of a plan, pursuant to *Sections 524 and 1141,* considerations that have some application [**6] to the present controversy.

In *Hong Kong and Shanghai Banking Corp., Ltd. v. Simon (In re Simon), 153 F.3d 991 (9th Cir. 1998),* the Ninth Circuit held in a Chapter 7 case that the violation of the discharge injunction by a foreign creditor outside the United States was sanctionable by the U.S. Bankruptcy Court. In so holding, the court stated:

> Congress has the unquestioned authority to enforce its laws beyond the territorial boundaries of the United States. *E.E.O.C.* v. *Arabian American Oil Co., 499 U.S. 244, 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991)* ("Aramco"). Whether Congress has exercised that authority in a

particular case is a matter of statutory construction. *Stegeman* v. *United States, 425 F2d 984, 986 (9th Cir. l970)(en banc).* In construing a statute to ascertain Congress' territorial intent, we begin with the presumption that "the legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros.* v. *Filardo, 336 U.S. 281, 285, 69 S. Ct. 575, 93 L. Ed. 680 (1949).* With that presumption in mind, we analyze intent [**7] by first examining the language of the act for indications of intent regarding extraterritorial application. *Aramco, 499 U.S. at 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274.* In addition to the plain statutory words, intent may be discerned with reference to similarly-phrased legislation, *id. at 250-51, HI S. Ct. 1227,* or the overall statutory scheme. *Foley Bros., 336 U.S. at 286, 69 S. Ct. 575.* If these inquires are inconclusive, examination of legislative history is appropriate. *Id.* Resort to administrative interpretations of the law may be employed if the legislative history is inconclusive. *Id. at 286-88, 69 S. Ct. 575.*

If Congressional intent concerning extraterritorial application cannot be divined, then courts will examine additional factors to determine whether the traditional presumption against extraterritorial application should be disregarded is a particular case. First, "the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in

adverse effects within the United States." *Environmental Defense Fund, Inc. v. Massey, 300 U.S. App. D.C. 65, 986 F.2d 528, 531 (D.C. Cir. 1993)* [**8] *(citing Steele* v. *Bulova Watch Co., 344 U.S. 280, 73 S. Ct. 252, 97 L. Ed. 319, 1953 Dec. Comm'r Pat. 424 (1952)).* Second, the presumption against extraterritoriality is not applicable when the regulated conduct is "intended to, and results in, substantial effects within the United States" *Laker Airways, Ltd. v. Sabena Belgian World Airlines, 235 U.S. App. D.C. 207, 731 F.2d 909, 925 (D.C. Cir. 1984).*

Applying this analysis to the instant case, the district court was entirely correct in upholding the bankruptcy court's order and giving effect to the *section 524* discharge injunction.

The district court properly concluded that as to actions against the bankruptcy estate, Congress clearly intended extraterritorial application of the Bankruptcy Code. The filing of a bankruptcy petition under *11 U.S.C. § § 301, 302 or 303* creates a bankruptcy estate. *11 U.S.C § 541 (a).* With certain exceptions, the estate is comprised of the debtor's legal or equitable interests in property "*wherever* [*779] *located and by whomever held.*" *Id.* (emphasis supplied). The district court in which the bankruptcy case is commenced obtains exclusive *in rem* jurisdiction over all of the [**9] property in the estate. *28 U.S.C. § 1334(e); Commodity Futures Trading Comm'n* v. *Co Petro*

Marketing Group, Inc., 700 F.2d 1279, 1282 (9th Cir. 1983)(interpreting *28 U.S.C. § 1471,* the statutory precursor to *28 U.S.C. § 1334(e)).* The court's exercise of "custody" over the debtor's property, via its exercise of *in rem* jurisdiction, essentially creates a fiction that the property - - regardless of actual location - - is legally located within the jurisdictional boundaries of the district in which the court sits. *See Katchen v. Landy, 382 U.S. 323, 327, 86 S. Ct. 467, 15 L. Ed. 2d 391 (1966)*(noting that bankruptcy courts have "constructive possession" over estate property) (internal quotation marks and citations omitted); *Commodity Futures, 700 F.2d at 1282* (noting that under the bankruptcy code, "all property of the debtor, wherever located, is in *custodia legis* of the bankruptcy court."). This includes property outside the territorial jurisdiction of the United States. *See Stegeman, 425 F.2d at 986* (construing extraterritorial jurisdictional [**10] reach of prior Bankruptcy Act); *see also Underwood v. Milliard (In re Rimsat, Ltd.), 98 F.3d 956, 961 (7th Cir. 1996).*

Given this clear expression of intent by Congress in the express language of the Bankruptcy Code, we conclude that Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate. Although Hong Kong-Shanghai concedes this point, it questions whether such an extraterritorial application may operate to enjoin a foreign proceeding. As a matter of general

principle, protection of *in rem* or *quasi in rem* jurisdiction is a sufficient basis for a court to restrain another court's proceedings. *Donovan v. City of Dallas, 377 U.S. 408, 412, 84 S. Ct. 1579, 12 L. Ed. 2d 409 (1964).* In such cases, "the state or federal court having custody of such property has exclusive jurisdiction to proceed." *Id.* This rationale extends to foreign proceedings. *See Seattle Totems Hockey Club* v. *National Hockey League, 652 F.2d 852, 855 (9th Cir. 1981); see also Gau Shan Co.* v. *Bankers Trust Co., 956 F.2d 1349, 1356 (6th Cir. 1992); China Trade & Develop. Corp.,* v. *U. V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987).* [**11]

In the bankruptcy context, the Seventh Circuit has expressly held that protection of the bankruptcy court's *in rem* jurisdiction over estate property allows an international proceeding to be enjoined pursuant to the automatic stay in *11 U.S.C. § 362. Underwood, 98 F.3d at 961. As* Chief Judge Posner explained: "The efficacy of the bankruptcy proceeding depends on the court's ability to control and marshal the assets of the debtor wherever located...." *Id.*

As applied to the concept of *in rem* bankruptcy jurisdiction, there is no functional difference between the automatic stay imposed by *11 U.S.C. § 362* upon the commencement of a bankruptcy and the injunction prohibiting collection actions against the bankruptcy estate provided in *11 U.S.C. § 524(a)(3).* Each stay operates to protect the estate and the *in*

> *rem* jurisdiction of the bankruptcy court. Accordingly, we join the Seventh Circuit's logic and hold that a bankruptcy court may validly exercise its *in rem* jurisdiction to protect estate property wherever the property is located in issuing a discharge injunction under *11 U.S.C. § 524.* [**12] Thus, the district court correctly held in this case that the *11 U.S.C. § 524* discharge enjoined Hong [*780] Kong-Shanghai from commencing collection against any bankruptcy estate property regardless of its geographic location.

Simon, 153 F.3d at 995-96.

According to *Section 541(a) of the Bankruptcy Code* n2 property of the bankruptcy estate includes every interest of a debtor in property "wherever located and by whomever held." In *Nakash* v. *Zur (In re Nakash), 190 B.R. 763 (Bankr. S.D.N.Y. 1996),* this provision was held to indicate congressional intent that the automatic stay provisions of *Section 362* of the Code be given extraterritorial application to protect a debtor from the filing of an insolvency proceeding against it in Israel.

n2 *Section 541 (a)* provides, as follows:

> *§ 541.* **Property of the estate.**
>
> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all

legal or equitable interests of the debtor in property as of the commencement of the

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is-

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date- -

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's

spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

11 U.S.C. § 541 (a).

[**13]

In the case of *In re Dow Corning Corp., 287 B.R. 396 (E.D. Mich. 2002),* a confirmed Chapter 11 plan was given extraterritorial effect based upon the following analysis:

> Generally, there is a presumption against extraterritorial application of United States law as argued by the Australian Claimants. However, in the bankruptcy context, that presumption does not apply if ignoring the bankruptcy court orders would have "substantial effects within the United States." *In re Simon, 153 F.3d 991, 997 (9th Cir. 1998).* As noted previously, Dow Australia is contributing cash and insurance assets to the Joint Plan and Dow Australia has filed a contribution claim against the Debtor. If the Australian

Claimants were allowed to pursue their claims against Dow Australia, the Debtor would lose Dow Australia's contribution and would also have to defend its products in the Australian courts.

It is noted that the Australian Claimants have submitted themselves to this Court's jurisdiction by participating in this bankruptcy action. When a creditor submits to bankruptcy court jurisdiction by filing a proof of claim in order to collect its debt, the creditor is [**14] subject to the court's orders and any discharge order pursuant to *11 U.S. C. § 524. Id. at 997.* International comity does not [*781] prohibit an injunction issued by the bankruptcy court. *Id. at 997-98.* It is noted that the Bankruptcy Code extends the bankruptcy court's power over the debtor's legal and equitable interests in property "wherever located." *Id. at 998; 11 U.S.C. § 541,* The bankruptcy was initiated in the United States and the Australian Claimants participated in the action. It is noted that the release and injunction provisions [of the Joint Plan] do not apply to the Australian courts but to the participants in the bankruptcy proceedings, specifically, the Debtor, Dow Australia and the Australian Claimants. The discharge provision of the Bankruptcy Code, *11 U.S.C § 524,* does not apply to courts outside of the United States but to those creditors who enjoyed the benefits of participating in the United States bankruptcy. *In re Simon, 153 F.3d at 999.* The release and injunction provisions in this case do not conflict with

the sovereignty of [**15] the Australian courts since those provisions do not apply to the Australian courts but to those who participated in the bankruptcy action, such as the Australian Claimants. It is further noted that there is no competing bankruptcy proceeding in Australia at this time, therefore, there is no conflict regarding the bankruptcy laws at issue. The Australian Claimants are therefore bound by the Court's orders because they participated in the bankruptcy action.

* * *

Without a release and injunction, the Shareholders would not have agreed to a plan at the funding level of the current Plan or one that involved the Shareholders' rights to hundreds of millions of dollars of insurance proceeds. . . The Debtor, alone, would have been unable to fund the Plan at its current level without the insurance proceeds and would have had to stay in bankruptcy. The Shareholders and the subsidiaries/affiliates would each have potential contribution and indemnity claims against the Debtor if litigation over the Debtor's products were asserted against the non-debtors and would have no interest in relinquishing any right to the insurance. As noted by the Bankruptcy Court and the Sixth Circuit, claims for [**16] indemnification and contribution would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with

> reorganization. *See, In re Dow Corning Corp., 244 B.R. 721, 745 (Bankr. E.D. Mich. 1999); In re Dow Corning Corp., 86 F.3d 482, 494.*
>
> The Debtor has consistently maintained that the main reason the Debtor filed for bankruptcy was because of the thousands of pending lawsuits against it claiming its silicone gel products caused injury and disease. The Joint Plan submitted by the Debtor and the Tort Claimants' Committee was to resolve the pending litigation against the Debtor, its Shareholders and its subsidiaries and affiliates . . . The injunction and release provisions are essential to the Joint Plan and to both the consenting and non-consenting creditors.

Dow Corning, 287 B.R. at 411-13.

The fallacy of the defendants' arguments is clear when one examines the cases. In *Interbulk Ltd.* v. *Louis Dreyfiis Corp. (In re Interbulk, Ltd.), 240 B.R. 195 (Bankr. S.D.N.Y. 1999),* Chief Judge Tina Brozman distinguished [**17] her opinion in *Maxwell, 170 B.R. 800 (Bankr. S.D.* AT. *1994),* holding that *Section 547* might be invoked to address a transfer hi the form of an attachment obtained against an American debtor by an American corporation in a foreign [*782] court, and stated that such a transfer was not extraterritorial:

> . . .What Dreyfus fails to realize is that there are critical distinctions between the facts of Maxwell and those present here.

In *Maxwell,* there were parallel bankruptcy proceedings in England and the United States for the debtor, an English corporation. *See Maxwell, 186 B.R. 807, 813 (S.D.N.Y. 1995).* The joint administrators appointed by the high court in London and the examiner appointed by this court entered into a procedural protocol (the "Protocol") to coordinate their efforts to administer the two cases as a single estate. *Id.* The Protocol provided for the creation of a single pool of assets in which creditors from both countries could share by filing claims in either jurisdiction. *Id.* Three foreign (to the United States) creditors (the "Creditors") had received transfers overseas from the debtor within 90 days of the debtor's bankruptcy [**18] filings. *Id,* All three filed claims in England, but not here. Cognizant that the administrators contemplated suit in the United States to recover the preferences from them, the Creditors sought unsuccessfully, in England, to enjoin the administrators from commencing suit under *section 547* of the Code. The administrators then filed adversary complaints in this court to recover the transfers from the Creditors. *Id. at 814.* The Creditors promptly moved for dismissal, pursuant to *Fed. R. Civ. P. 12(b)(6),* for failure to state a claim upon which relief could be granted. *Id.* The Creditors argued that the transfers were extraterritorial in nature and considerations of comity prevented the use of *section 547* to avoid them. *Id.* I concluded that *section 547* was not meant by Congress to apply extraterritorially and that

> inasmuch as the center of gravity of these transfers was indeed extraterritorial, they could not be avoided. I alternatively concluded that principles of international comity dictated that the avoidance actions had to be dismissed. Whereas my decision was affirmed on both grounds in the district court, in the [**19] further appeal to the circuit court, only the alternative holding was reached and my decision was affirmed on that ground alone. The circuit court did not rule on the question of first impression - whether the U.S. preference laws are extraterritorial in their reach.

Interbulk, 240 B.R. 195,198-199.

Grandote Country Club, 252 F.3d 1146 (10th Cir. 2001), another case cited by the defendants, is equally inapposite to the facts of the instant case as was *Maxwell. Grandote* was a choice of law decision which, like *Maxwell,* involved parallel or duplicate insolvency proceedings pending in this country and overseas. The trustee in a Japanese bankruptcy case brought an ancillary action in this country under *Section 304* to avoid the tax sale of a Japanese-owned golf course in Colorado as a fraudulent conveyance. The question raised was whether to apply the law of Japan or of this country to a proceeding brought in this country by a foreign national relating to land located in this country. The bankruptcy, district and circuit courts discounted questions of comity and applied the *Colorado Uniform Fraudulent Transfer Act,* holding that the tax [**20] sale in question did not effect a fraudulent transfer. *252 F.3d at 1150-52,*

The instant complaint was brought by the involuntary debtor's bankruptcy trustee in a proceeding filed in this country to determine the rights of the debtor

in property located outside of this country which she allegedly transferred to insiders, namely her children, for no consideration [*783] and which she failed to disclose to her creditors.

The fact that there is no parallel or duplicative insolvency proceeding now pending in the Bahamas is an important factor in this Court's determination to deny the motion to dismiss. The defendants claim that Bahamian law controls the interest of the debtor in property located there. However, having conveyed the property to the defendant transferees, it is obvious that considerations of comity with the Bahamas are not implicated here. Under Bahamian law, the debtor has no further interest in the property conveyed and according to the defendants, the transfer to them cannot be avoided.

This fact, if true, means that granting the motion to dismiss will most certainly result in prejudice to the debtor's American creditors, whose interests are represented here by [**21] the trustee.

Professor Jay Lawrence Westbrook, Benno C. Schmidt Chair of Business Law at the University of Texas School of Law, who was appointed *amicus curiae* by Chief Judge Brozman in the *Maxwell* case, rendered his opinion regarding the proper choice of law to be applied in such a straight-forward case as the instant one:

> . . . In a case like *Maxwell,* a particularized choice-of-law analysis may be unavoidable. In most transnational cases, however, the home country of the debtor-transferor of an alleged preference will be beyond serious argument. I continue to believe application of a home-country rule in those cases makes the most sense.

Jay Lawrence Westbrook, *The Lessons of Maxwell Communication,* Fordham Law Review, May 1996, 2531,2541.

Regardless of the fact that the land in question is located in the Bahamas, it is property of the estate within the subject matter jurisdiction of this Court pursuant to *Section 541(a).* This Court enjoys primary jurisdiction over the subject property because there is no competing insolvency proceeding involving the debtor now pending in the Bahama Islands. *Cf. Stonington Partners, Inc.* v. *Lernout & Hauspie Speech Products, N. V., 310 F.3d 118 (3d Cir. 2002)* [**22] (U.S. Bankruptcy Court erroneously entered "anti-suit" injunction against pending Belgian insolvency proceeding according to the *Maxwell* analysis); and *Official Committee of Unsecured Creditors v. Transpacific Corp. Ltd. (In re Commodore Intern., Ltd.), 242B.R. 243 (Bankr. S.D.N.Y,* 7 P9P,) (Bahamian insolvency proceedings were given deference under the principle of comity, where a competing insolvency proceeding was pending in the Bahamas).

This Court has personal jurisdiction as well over the parties, including the defendants, both of whom are domiciliaries of the United States who were properly served. As the debtor's children, the defendant-transferees are insiders of the debtor. This matter is a core proceeding over which this Court is exercising *in rem* jurisdiction. *28 U.S. C. § 157(b)(2)(F) and (H).*

For all these reasons, the defendants' motion to dismiss will be DENIED.

ORDER ACCORDINGLY.

SO ORDERED

Dated October 07, 2003

ORDER DENYING THE DEFENDANTS' MOTION TO DISMISS

Based upon the memorandum opinion filed simultaneously herewith, the defendants' motion to dismiss is [**23] hereby DENIED.

JUDGMENT

Filed: February 14, 2006

[ENTERED: February 14, 2006]

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 05-1054
CA-04-1947-WMN

In Re: BETTY I. FRENCH
Debtor

RANDY LEE FRENCH; DONNA MARIE SHAKA
Appellants

v.

GEORGE W. LIEBMANN
Trustee - Appellee

Appeal from the United States District Court for the District of Maryland at Baltimore

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

11 U.S.C. § 541:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

*****

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

11 U.S.C. § 544:

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 547

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 548:

(a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily –

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B) received less than an equivalent value in exchange for such transfer or obligation; and

(ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

***

(d)(1) For the purposes of this section, a transfer is made when such transfer is so far perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

11 U.S.C. § 550:

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

28 U.S.C. § 1334:

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the property of the estate.

[1932] 4 D.LR. 529, *; 1932 D.LR. LEXIS 649, **

(C) The Cartwright Group Ltd., 2006

DUKEet al. v. ANDLER et al.

[1932] 4 D.LR. 529; 1932 D.LR. LEXIS 649

CASE-HISTORY: Reversing [1932] 2 D.L.R. 19; Varying in part [1931] 3 D.L.R.561

Supreme Court of Canada

JUDGES: Duff, Rinfret, Lamont, Smith and Cannon, JJ.

October 11, 1932

KEYWORDS-1: Conflict of Laws I A — Jurisdiction of foreign Court in personam -Title to land in another country.

KEYWORDS-2: Judgments and Orders IV A — Foreign judgments based on fraud --Purporting to have effect in rem — Recognition -- Conclusiveness — Whether supplementary enforcement.

SUMMARY-2: Courts of a foreign country have no jurisdiction to adjudicate in rem upon the title to any immovable not situate in that country. Thus, when the defendant is resident within the territory of a foreign Court and has in alleged fraud of the plaintiff obtained title to land situated in another country, a judgment of the foreign Court purporting to deal with the title to that land does not affect the title as such and can be enforced merely in personam. Such a judgment cannot be recognized by the Courts of the country of the situs as binding between the parties and will not be enforced

against the defendant there by a supplementary judgment in rem.

APPEAL by the defendant from the judgment of the British Columbia Court of Appeal, [1932] 2 D.L.R. 19, 45 B.C.R. 96, reversing in part [1931] 3 D.L.R. 561, 43 B.C.R. 549. Reversed. G. F. Henderson, K.C., and D. K. MacTavish, for appellants.

A. Bull, K.C., for respondents. JUDGMENT-BY: DUFF, J.

SMITH, J.

JUDGMENT: DUFF, J.:—The appeal should be allowed, and the action dismissed, with costs to defendants throughout, for the reasons given by Smith, J.

RINFRET and LAMONT, JJ,, concur with SMITH, J.

SMITH, J.:—On September 25, 1925, the appellant George E. Duke, entered into a contract with Josephine Promis, Augusta Col, Sophia Promis, Mary Giflespie, and Oscar Promis for the purchase of certain real estate in the City of Victoria, in the Province of British Columbia.

The contract reads:--

We the undersigned (naming the above vendors) have this day granted, transferred, sold and conveyed to G. E. Duke the following described real property situated in Victoria City, B.C., Dominion of Canada.

Then follows the particular description, the price, $55,000, payable $10,000 cash and a note for $45,000 to be secured by a mortgage on certain property in the City of Berkeley, in California, "the said mortgage to be

subject to an existing encumbrance now of record in the sum of $22,150 as a first lien on the property."

There is then the following provision:--

> Upon evidence of good merchantable title being vested in G. E. Duke, he will immediately cause to be paid in to the Alameda County Title Insurance Company the sum of ten thousand ($10,000.00) dollars U. S. lawful money, together with note and mortgage to be delivered to the vendors.

All the parties to the contract were, at the time, residents of California, and the survivors and executors of the two vendors, who died shortly after the date of the contract, have continued to be residents of that state.

This contract or another conveyance was placed in the hands of the Alameda County Title Ins. Co., it is claimed in escrow, which company handed over the contract or the other conveyance to the defendant G. E. Duke, who registered same and thus became the registered owner of the Victoria property, which he conveyed to his wife, the defendant Margaret E. Duke, who mortgaged it for $30,000.

The vendors brought action in the Superior Court of the State of California in and for the County of Alameda, against the defendants, to rescind and cancel the contract and the mortgage, and to require the defendants to re-convey to the plaintiffs the Victoria property, alleging that G. E. Duke obtained possession of the conveyance without the knowledge of the plaintiffs and without complying with the terms of the agreement, and in violation of the escrow agreement, "in this," that he delivered the mortgage stipulated for subject to an encumbrance of $9,605 in addition to the encumbrance of $22,150 mentioned in the agreement.

The defence to the complaint about the $9,605 encumbrance, stated shortly, was that the vendors falsely represented to defendant G. E. Duke that the Victoria property was then producing net earnings of $6,775 per year, and that the then tenants were ready and anxious to obtain new leases on the same terms as the existing leases, whereas in fact the net earnings were not greater than $3,903 per year, and the then tenants were unwilling to renew their leases on the same terms, but were preparing to quit unless extensive repairs were made, and that, to retain them, repairs costing $11,525 had to be made, which sum defendant G. E. Duke claimed as damages for false representations inducing him to make the contract, and which he was entitled to set off against the $9,605 encumbrance.

The defence further alleged that the Alameda County Title Ins. Co. was authorized by the plaintiff to cause the deed to be recorded, vesting the title to the Victoria property in defendant G. E. Duke before any part of the consideration therefor was to be paid or delivered by the defendant to the plaintiffs, "all in conformity to said contract."

I take it that this means that such is the proper construction to be put on the terms of the contract.

The learned trial Judge in the California Court found that defendant G. E. Duke agreed to deliver the $45,000 mortgage free and clear of the $9,605 encumbrance before taking title to the Victoria property, and that there were no false representations, and no set-off, as alleged.

He also finds that defendant G. E. Duke got possession of the deed without paying the $10,000, though there is no such claim in the plaintiffs' pleadings, the only non-compliance with the terms of the agreement alleged being that referred to above.

The judgment entered in the Superior Court of California, omitting the style of cause, is as follows; —

The Court having made and filed its Findings of Fact and Conclusions of Law herein, now, therefore, in accordance therewith,

It is Ordered, Adjudged and Decreed that the defendants G. E. Duke and Margaret E, Duke, execute, acknowledge and deliver, and cause to be recorded and registered according to the forms and laws of British Columbia, Dominion of Canada, within 30 days of notice of entry hereof, a deed of conveyance of said 'Victoria Property' to Josephine Promis, Augusta Col, Mary Glliespie, A. G. Col and Josephine Andler, plaintiffs herein, and vesting in them the title thereto, subject to an encumbrance of $ 30,000 now of record, and subject to no other iiens or encumbrance whatsoever, and to do and perform, or cause to be done or performed such other act or acts as may be necessary or proper in the premises, to the end that the plaintiffs may be restored to the ownership and possession of said Victoria Property' - - which said 'Victoria Property' is described as follows, to wit:

Ail and singular these certain parcels or tracts of land and premises situate, lying and being Lots Three and Four, Block Seventy-five, Victoria City, recorded in Absolute Fees Book Fol. 22, Vol. 22, (Date of Registration May 10, 1904, 11.10 a.m.).

Lots 11 and 12, block 75, map 219, Victoria City; recorded in Absolute Fees Book Fol. 30, Vol. 23. (Date of Registration, February 21, 1906, 10 a.m.).

Together with all improvements thereon,

It is further Ordered and Adjudged that in the event of the failure or refusal of G. E. Duke and/or Margaret E.

Duke, defendants herein, to so convey said 'Victoria Property' within said time, George E. Gross, Clerk of this Court, be, and he is hereby, appointed as Commissioner of this Court; and said George E. Cross, as such Commissioner, is hereby ordered and empowered to make, execute and deliver such deed, and cause the same to be so recorded and registered, and to do and perform any and ali other acts as may be necessary or proper, to effect and perfect a conveyance of said 'Victoria Property' to the plaintiffs herein named, as and for said G. E. Duke and Margaret E. Duke, defendants herein, as their act and deed.

It is further Ordered Adjudged and Decreed that that certain instrument in writing designated as 'contract of sale' dated September 25, 1925, and attached to Plaintiffs' complaint herein as ex. 'A,' wherein and whereby Josephine Promis, Augusta Col, Sophia Promis, Mary Gillespie and Oscar Promis, agreed to grant, transfer, sell and convey to G. E. Duke, one of the defendants herein, the said 'Victoria Property' for certain considerations therein mentioned, be, and the same is hereby, cancelled and rendered null and void and of no effect whatsoever.

It is further Ordered, Adjudged and Decreed, that the plaintiffs herein named do have and recover of and from the defendants G. E. Duke and Margaret E. Duke the sum of $16,804.11, together with plaintiffs' costs and disbursements incurred herein, taxed in the sum of $

Dated this 30th day of July, 1928,

(Sgd.) John J. Allen, Judge.

The defendants refused to execute a conveyance, as ordered by this judgment, and a conveyance was executed in their name by George E. Gross, County Clerk and

Commissioner of the Superior Court, pursuant to the terms of the judgment.

The plaintiffs then brought the present action in the Supreme Court of British Columbia, [1931] 3 D.L.R. 561, for a declaration that, by virtue of the conveyance referred to, or, alternatively, by virtue of the conveyance and of the judgment referred to, and in the further alternative by virtue of the judgment alone, the plaintiffs are the owners of and entitled to be registered as owners in fee simple of the Victoria property in question, subject to the mortgage of $30,000 and interest, mentioned above.

There is the further claim that the Court, in the exercise of its jurisdiction to implement the judgment of the Superior Court of the State of California, do vest the property in the plaintiffs.

Judgment was given, declaring that, by virtue of the judgment of the Superior Court of California and of the conveyance made in pursuance of it, the plaintiffs are the owners of the property in Victoria subject to the $ 30,000 mortgage and a certain registered lease, and that the property vest in the plaintiffs, subject to these charges.

On appeal, the Court of Appeal of British Columbia, [1932] 2 D.L.R. 19, 45 B.C.R. 96, by a majority of three to one, varied this judgment by striking out the first adjudicating paragraph and substituting a paragraph in different language, vesting the property in the plaintiffs,

McPhillips, J.A., dissenting, would have allowed the appeal and dismissed the action. From this judgment of the majority, the present appeal is taken.
The question involved is whether or not the judgment of the foreign Court on the question of title and ownership of this real property situate in British Columbia is to be

recognized as final and to be enforced by the Courts of British Columbia,

The general rule that the Courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in such country is not disputed.

Considering the operation of foreign law in regard to real and immovable property, Story on Conflict of Laws, 8th ed., at p. 591, says:—

> And here the general principle of the common law is, that the laws of the place where such property is situate, exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. The title therefore to real property can be acquired, passed, and lost only according to the lex rei sitae. This is generally, although (as we shall presently see) not universally, admitted by courts and by jurists, foreign as well as domestic.

Then, at p. 757, para. 543, dealing with the jurisdiction of a nation over a person in its domain, there is the following: —

> A suit cannot, for instance, be maintainable against him, so as absolutely to bind his property situate elsewhere; and, a fortiori, not so as absolutely to bind his rights and titles to immovable property situate elsewhere,

Dicey's Conflict of Laws, 5th ed., at p. 395, citing Story on Conflict of Laws, 8th ed., and Piggott's Foreign Judgments & Jurisdiction, 3rd ed., has the following:—

The Courts of a foreign country have no jurisdiction —

(1) to adjudicate upon the title, or the right to the possession, of any immovable not situate in such country; or

(2) (semble) to give redress for any injury in respect of any immovable not situate in such country.

The undoubted rule, in short, is that, if a Court pronounce a judgment affecting land out of the jurisdiction, the Courts of the country where it is situated — and, it is presumed, also the Courts of any other country -- are justified in refusing to be bound by it, or to recognize it; and this even if the judgment proceed on the lex loci rei sitae.

This rule is merely an application of a more general principle that no Court ought to give a judgment the enforcement whereof lies beyond the Court's power, and especially if it would bring the Court into conflict with the admitted authority of a foreign sovereign, or what is the same thing, the jurisdiction of a foreign Court.

There is, however, a long line of cases in which it has been held that English Courts will enforce rights affecting real estate in foreign countries if such rights are based on contract, fraud or trust, and the defendant resides in England.

An early case of this kind is Penn v. Lord Baltimore, 1 Ves. Sen. 444, 27 E.R. 1132, where an agreement in reference to lands in Pennsylvania made in England was sought to be enforced, the residence of the parties being in England. It was held that there was jurisdiction. The Lord Chancellor says, at p. 447: —

The conscience of the party was bound by this agreement; and being within the jurisdiction of this

> court .which acts in personam, the court may properly decree it as an agreement, if a foundation for it.

See also Deschamps v. Miller, [1908] 1 Ch. 856, at p. 863.

In numerous decisions, however, besides Penn v. Lord Baltimore, it has been pointed out that, in exercising jurisdiction in such cases, the Courts act in personam.

In the case of Lord Cranstown v. Johnston, 3 Ves. 170, 30 E.R. 952, defendant, being a creditor of the plaintiff, obtained judgment in the Island of St. Christopher, and at the sale under the execution, of which the plaintiff had no notice, purchased the plaintiff's interest in lands of plaintiff there at much less than the value. Both parties residing in England, it was held there was jurisdiction, and the defendant was ordered to reconvey on payment of the amount owing.

In Norton v. Florence Land & Public Wks. Co. (1877), 7 Ch. Div. 332, Jessel, M.R., states that the decision in Lord Cranstown v. Johnston must be understood as limited to jurisdiction in personam.

In Paget v. Ede (1874), L.R. 18 Eq. 118, it was held that an equity of redemption is not an estate but merely a right, and that a decree of foreclosure, being a decree in personam, could be made in England as the mortgagor and mortgagee resided in England, though the lands were not in England.

In Ex p. Pollard, Re Thomas Courtney & George Courtney (1840), Mont. & Ch. 239, at p. 250, there is the following passage in the judgments-

> It is true that in this country contract for sale, or (whether expressed or implied) for charging lands, are in certain cases made by the courts of equity to

> operate in rem; but in contracts respecting lands in countries not within the jurisdiction of these courts they can only be enforced by proceedings in personam, which courts of equity here are constantly in the habit of doing; not thereby in any respect interfering with the lex loci rei sitae.

In Angus v. Angus (1736-7), West temp. Hard. 23, "to a bill brought for possession of lands in Scotland, and for discovery of the rents and profits," and of deeds and fraud in obtaining them, it was pleaded that the matter was out of the jurisdiction.

The Lord Chancellor says (pp. 23-4):--

This court acts upon the person as to the fraud and discovery, therefore the plea must be overruled. To have made this a good plea, there ought to have been a farther averment, that the defendant was resident in Scotland. This had been a good bill as to fraud and discovery if the land had been in France, if the persons were resident here; for the jurisdiction of this court as to frauds, is upon the conscience of the party.

I am in doubt as to parts of the bill for relief; for I cannot give the plaintiff possession any other way than by compulsion on the defendant's person, whilst it is within the jurisdiction of the court.

In British South Africa Co. v. Companhia de Mocambique, [1893] A.C. 602, it was held by the Queen's Bench Division that the Courts in England had no jurisdiction to entertain an action for a declaration of title to lands in South Africa; and by the House of Lords, no jurisdiction to entertain an action for damages in such lands. Herschell, L.C, at p. 624, says:--

> No nation can execute its judgments, whether against persons or movables or real property, in the country of another. On the other hand, if the Courts of a country were to claim, as against a person resident there, jurisdiction to adjudicate upon the title to land in a foreign country, and to enforce its adjudication in personam, it is by no means certain that any rule of international law would be violated .

And, at p. 626:--

Whilst Courts of Equity have never claimed to act directly upon land situate abroad, they have purported to act upon the conscience of persons living here.

Lord Halsbury, at p. 631, says:--

> There is a concurrence of opinion of most jurists, if not all, as to the difference between what we call realty and personalty, by whatever words those things are distinguished in the jurisprudence of foreign countries, which affects very materially the right to try. Vattel distinguishes the questions which may properly be tried where defendant has his settled place of abode, but always subject to this, that if the matter relates to an estate in land or to a right annexed to such an estate (quoting Vattel)

in such a case, inasmuch as property of the kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the state in which it depends.

In Henderson v. Bk. of Hamilton (1894), 23 S.C.R. 716, in this Court it is pointed out that Courts of Equity held that where personal equities existed between parties over

whom they had jurisdiction, though such equities might have reference to lands situate without the jurisdiction, they would give relief by a decree operating not directly upon the lands, but strictly in personam, and that such decrees would have been unenforce- able in the foreign jurisdiction, and might have brought the Courts decreeing them into collision with the former, within whose local jurisdiction the lands were situated. British South Africa Co. v. Companhia de Mocambique, just referred to, is cited and relied on.

The title to real property therefore must be determined by the standard of the laws relating to it of the country where it is situated. The grounds upon which, and the circumstances under which a conveyance would be set aside under the law of California may differ from those under which it would be set aside under the law of British Columbia. The conveyance from appellant G. E. Duke to his wife, the appellant Margaret E. Duke, could only be set aside in British Columbia by virtue of the statute law of that Province, and the Courts of one country are not presumed to know the laws of another country.

In Norris v. Chambres, 29 Beav. 246, 54 E.R. 621, a claim was made for a lien on real property in Prussia. After stating a certain manner in which a lien on land may be acquired in England, the decision proceeds (p. 255);--

Assuming this to be so, this is purely a lex loci which attaches to persons resident here and dealing with land in England. If this be not the law of Prussia, I cannot make it so, because two out of the three parties dealing with the estate are Englishmen, and I have no evidence before me that this is the Prussian law on this subject, and if it be so, the Prussian Courts of Justice are the proper tribunals to enforce these rights.

An adjudication as to title to the lands in question, to have any effect in British Columbia, must be an adjudication on the basis of British Columbia law relating to real property applied to the facts.

The objection to accepting the judgment of a foreign Court as conclusive on a question of title to land is shown by what is laid down by Cottingham, L.C., in Ex p. Pollard, cited above, in the following language (Mont. & Ch. at pp. 250-1): —

If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the coup might otherwise think it right to decree, it would be useless and unjust to direct him to do the act, but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.

The Courts of California therefore must be assumed to have based their judgments on California law, without being influenced by any consideration of the effect on the title, of the contract and of equities arising from it and what followed, according to the law of British Columbia, and without any regard to the statute law of British Columbia bearing on the conveyance from G. E. Duke to his wife.

It may be that on the facts as found, the Courts of British Columbia, in applying the laws of British Columbia, would reach the same conclusion as the California Courts, but it is to be remembered that findings of fact may in some cases be based on the particular law to be

applied to them. For instance, a finding of fraud depends on what constitutes fraud under the particular law to be applied.

In any event, we must deal with the question as a general proposition, and not merely from the point of view of the facts in this particular case.

The question at issue here has come before the Supreme Court of the United States in a number of cases, but it is to be noted that there is a special clause in the constitution of the United States dealing with the credit to be given by the Courts of one state to the judgments of the Courts of another.

It appears, however, that this clause does not make judgments of the Courts of one state dealing with lands in another binding on the Courts of the latter.

In Carpenter v. Strange (1890), 141 U.S.R. 87, the Court of New York State, where the parties resided, decreed that a conveyance of land in Tennessee alleged to be fraudulent was absolutely null and void. The Courts of Tennessee refused to recognize this part of the judgment, and were upheld by the Supreme Court. The following is a passage from the judgment (p. 106): —

The courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee, exclusively subject to its laws and the jurisdiction of its courts.

Again in Fall v. Eastin (1909), 215 U.S.R. 1, in the judgment of the same Court there is the following passage (p. 9):--

> A court of chancery, acting in personam, may well decree the conveyance of land in any other State, and

> may well enforce its decree by process against the defendant. But neither the decree itself nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court.

Respondents put much reliance on the case of Houlditch v. Donegal, 8 Bli. N.S. 301, 5 E.R. 955, Upon a bill in chancery in England by creditors a decree was made to execute the trusts of a deed by which lands in Ireland were vested in trustees for payment of debts. A receiver was appointed and an injunction granted, and a bill was filed in the Court of Chancery in Ireland to carry the former decree into execution. The Irish Court held that it had no jurisdiction. It was held, reversing this judgment, that there was jurisdiction. The basis of this decision was that a foreign judgment is only prima facie evidence, and the propriety of the English decree might be enquired into in the Irish Court,

This doctrine, that a foreign judgment is only prima facie evidence, and the propriety of the English decree might be enquired into in the Irish Court.

This doctrine, that a foreign judgment is only prima facie evidence, is now considered erroneous. Dicey's Conflict of Laws, 4th ed., at p. 449, and cases there cited.

Martin, 3.A., [19321 2 D.L.R. 19, 45 B.C.R. 96, places reliance on the cases of Law v. Hansen (1895), 25 S.C.R. 69; Nouvion v. Freeman (1887), 37 Ch. D. 244, and, in the House of Lords (1889), 15 App. Cas. 1; and a number of others of similar import.

The remarks that he quotes from these decisions are the enunciation of the general rule that the judgment of a foreign Court of competent jurisdiction having the force of

res judicata in the foreign country has the like force in England.

The question here is whether or not the judgment of the foreign Court in question, adjudicating on the right and title to real property in British Columbia, is one of the exceptions to this general rule.

The numerous decisions referred to above seem to establish beyond question that such a judgment is in personam only, and affects the conscience of the parties within the jurisdiction of the Court, and stands on an entirely different footing in the Courts of the country where the land is situated from the ordinary judgment coming within the general rule, such as a foreign judgment for debt.

In the present case the plaintiffs sue in British Columbia to enforce a judgment of the California Courts deciding that the plaintiffs are the owners of the British Columbia land in question, rather than the defendants, one of whom is the registered owner. In California, it must be conceded that that judgment has effect only in personam, but if the Courts of British Columbia were obliged to enforce it between the same parties, without question, there would be no practical difference, in effect, between such a judgment and a judgment for a debt, and the distinction so much insisted on in the authorities referred to would be of no real consequence.

In my opinion the rule stated by Dicey quoted above, that the Courts of a foreign country have no jurisdiction to adjudicate upon the title or the right to the possession of any immovable not situate in such country, and the statement in the authorities referred to, that controversies in reference to land can only be decided in the state in which it depends, and that judgments of foreign Courts purporting to deal with the title and with

rights to lands in another country can only be enforced by proceedings in personam, show that the judgment of the Court of California here in question does not, in British Columbia, affect the title to the lands in question, and is not a judgment that should be enforced by the Courts of British Columbia as binding there on the parties.

The appeal should be allowed, and the action dismissed, with costs to defendants throughout.

CANNON, j., concurs with SMITH, J.
Appeal allowed.

1910

THE

LAW REPORTS

of the incorporated council of law reporting

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

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1910

LONDON

[HOUSE OF LORDS.]

H. L. (E.) GALBRAITH Appellant;

And

GRIMSHAW AND ANOTHER Respondents.

Attachment of Debts - Scottish Judgment - Extension to England -Garnishee Order Nisi - Service on Garnishee - Subsequent Bankruptcy of Judgment Debtor in Scotland - Rights of Trustee in Bankruptcy - Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 117.

A judgment for a sum of money which was obtained in an action in Scotland was extended to England under the Judgment Extension Act, 1868, and the judgment creditor served a garnishee order nisi on a firm who owed a debt in England to the judgment debtor.

After the service of the garnishee order nisi the whole estate of the judgment debtor was sequestrated under the Scottish bankruptcy law and transferred wherever situated to the appellant as trustee for the creditors with power to recover all estates, debts, or money due to the judgment debtor. In an interpleader issue in England between the trustee and the judgment creditor as to their respective claims to the garnished debt: -

Held, that the judgment creditor had by the service of the garnishee order nisi obtained an attachment in England before the date of the sequestration, and that the Scottish Court had no power to interfere with his claim.

Decision of the Court of Appeal, [1910] 1 K. B. 339, affirmed.

The facts material to this appeal are states in the head-note. The dates are as follows: October 23, 1908, judgment for 311*l* and costs in an action in Scotland by Grimshaw and another against Merrens & Sons; October 26, judgment extended to England; October 27, garnishee order nisi in respect of 400*l* owed to Merrens & Sons in England served upon the firm in England who owed the 400*l*; November 12, sequestration in Scotland of the estate of Merrnes & Sons; December 7, confirmation of the appellant as trustee of the sequestrated estate.

In the interpleader issue between the appellant and the respondents (Grimshaw and another) as to their respective claims to the garnished debt Ridley J. gave judgment for the appellant. This decision was reversed by the Court of Appeal (Farwell, Buckley, and Kennedy L.JJ.), who entered judgment for the respondents. Hence this appeal.

June 22, 23. *Radcliffe, K.C.*, and *Pringle*, for the appellant. The garnishee order nisi did not transfer the property in the sum garnished from the judgment debtor, nor did it create a charge. There is in our law no term which exactly defines the right of a garnishor, which has been described as a lien or security, it is something like a distringas on stock. A receiver in a debenture-holders' action is entitled to precedence over the garnishor, although appointed after the garnishee order: *Norton v. Yates* (1); *Geisse v. Taylor* (2); *Cairney v. Back*.l (3) A garnishee is but a stakeholder. In *Rogers v. Whiteley* (4) Lord Watson said: "The effect of an order attaching all debts . . . . is to make the garnishee custodier for the Court, of the whole funds attached." In *In re Combined Weighing and Advertising Machine Co.* (5) it washeld that a garnishee order does not create between garnishor and garnishee any debt either at law or in equity. *Holmes v. Tutton* (6) was like the present case, and the title of the assigness in bankruptcy prevailed.

The Court will recognize and give effect to a foreign bankruptcy: *Sill v. Worswick*. (7) In *Solomons v. Ross* (8) the title of the administrator of "desolate" estates in Holland was preferred to that of a person who had, like a garnishor, attached money of the bankrupt. A similar order with respect to Irish property was made in *Neale v. Gottingham* (9), referred to in the same note, and in *Jollet v. Deponthieu*. (10) The question must be decided according to Scottish and not English law.

Rawlinson, K.C., and *H. Dobb*, for the respondents. By the order of the King's Bench Division the respondents acquired a lien or charge for the money lodged in Court by the garnishees, and that charge had priority to the rights of the appellant. The money was bound in the hands of the garnishees. The garnishees could not pay the money due to the bankrupt to any one else than the respondents. On the order's becoming absolute the money attached become the property of the creditors. Sect. 117 of the Bankruptcy Act, 1888, is only machinery, and is no authority for introducing English law into a Scottish bankruptcy. When the garnishee order was obtained the rights of the Scottish creditors and of the appellant had not come into existence; they only arose on November 12, when the petition was presented. There is no authority for applying the provisions of s. 45 of the Bankruptcy Act, 1888, which require that an execution or attachment must be completed in order to prevail over the trustee's title, to Scotland. The question must be decided by English and not Scottish law. In the cases cited from Henry Blackstone time was the governing consideration and the title of the assignees in bankruptcy was prior to the garnishee order. On the effect of an arrestment, which is the equivalent of a garnishee order, Lord Deas' judgment in *Goetze v. Aders* (1) supports the respondents.

Radcliffe, K.C., in reply.

Lord Loreburn, L.C. My Lords, in this case I think that the conclusion arrived at by the Court of Appeal ought to be supported.

To my mind your Lordships would be wise to apply the rule explained by Lord President Inglis in the case of *Goetze v. Alders*. (2) I think that rule is applicable in England also. The attachment in England will not prevail against a claim of a foreign trustee in bankruptcy which is prior in date, provided that the effect of the bankruptcy is to vest in the trustee the assets in question. If the attachment is prior in date, ten I do not think it will affected by the title of the trustee in a foreign bankruptcy; and the reason is that a foreign law making the title of the trustee relate back to transactions which the debtor himself could not have disturbed has no operation in England, which the English law as to relation back applied only to cases of English bankruptcy, and therefore the trustee may find himself (as in this case) falling between two stools.

I think, my Lords, in each case the question will be whether the bankrupt could have assigned to the trustee, at the date when the trustee's title accrued, the debt or assets in question situated in England. If any part of that which the bankrupt could have then assigned is situated in England, then the trustee may have it; but he could not have it unless the bankrupt could himself have assigned it. It follows that the trustee cannot have this debt free from the garnishee order, because the bankrupt could only have assigned it on November 12, subject to the garnishee order.

My Lords, with regard to s. 117 of the Bankruptcy Act, 1888, I think that affects procedure and does not enlarge the rule to which I have alluded. And I am not prepared to accept and act upon the case which is scantily reported in the volume of Blackstone's Reports to which

we have been referred. (1) I am not prepared to accept that case as an authority against the rule which I have referred to.

I will not say, my Lords, that there may not be exceptions to that rule; as, for example, if the effect of the foreign bankruptcy were to transfer to the trustee only part of the assets of the bankrupt. Such points, to my mind, ought not to be settled or treated as settled except after consideration of the cases in which they actually arose. But I think it is enough to say in the present case I see nothing that should disturb the rule or the principle to which I have adverted.

Lord Macnaghten. My Lords, this is rather a singular case. If the bankruptcy had been an English bankruptcy, the attachment, being uncompleted, would not have prevailed against the claim of the judicial factor or the trustee in bankruptcy. If the attachment, or the process in Scotland that corresponds more or less with attachment, had been pending there, the claim of the judicial factor or the trustee in bankruptcy must have succeeded. But, as it is, a creditor of the bankrupt having duly obtained an attachment in England before the date of the sequestration cannot, I think, be deprived of the fruits of his diligence.

It may have been intended by the Legislature that bankruptcy in one part of the United Kingdom should produce the same consequences throughout the whole kingdom. But the Legislature has not said so. The Act does not say that a Scotch sequestration shall have effect in England as if it were an English bankruptcy of the same date. It only says that the Courts of the different parts of the United Kingdom shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy. The English Court, no doubt, is bound to carry out the orders of the Scottish Court, but in the

absence of special enactment the Scottish Court can only claim the free assets of the bankrupt. It has no right to interfere with any process of an English Court pending at the time of the Scotch sequestration. It must take the assets of the bankrupt such as they were at that date and with the liabilities to which they were then subject. The debt attached by the order nisi was at the date of the sequestration earmarked for the purpose of answering a particular claim - a claim which in due course would have ripened into a right. With this inchoate right the Scottish Court had no power to interfere, nor has it even purported to do so. Therefore I think the appeal fails.

Lord James of Hereford. My Lords, I concure.

Lord Dunedin. My Lords, I concur with the opinions which have been delivered. I think that the general principle which underlies every bankruptcy system is that after bankruptcy the bankrupt is no longer really the owner of his own property, but holds his own property as trustee for the whole of his creditors for equal division. That carries with it necessarily the idea that some of his creditors may already have got security or may have taken part of the property in execution. And if the matter went no further that that it is quire clear that both of those positions would be good as against the bankrupt himself and consequently as against the rest of his creditors. It is a very natural development of that in working out a bankruptcy system that you should introduce a law of relation back, and that within a certain period, which will always be an arbitrary period determined by positive enactment, you should hold that the security given or the execution affected should have no effect and that that property should be like the rest of the property of the bankrupt.

Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should

be a rule of international law that if the Court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allows steps to be taken in its territory which would interfere with that process of universal distribution; and that I take to be the doctrine at the bottom of the cases of which *Goetze v. Aders* (1) is only one example. But if you wish to extend that not only to the question of recognizing a process of universal distribution but also of introducing the law of relation back, then it seems to me you at once get into rather great difficulties, because the question at once arises, according to which law will you apply the doctrine of relation back? If you take the law of the country of the bankruptcy, then the execution or security in question may be and often is of a kind which is quite foreign to the system of law which you are administering in the Bankruptcy Court. If on the other hand you take the law of the country of the attachment, then you have to administer a law which is quite ignorant of the precise execution or security with which it has to deal. Accordingly, to say the least of it, there has been quoted to us no instance where as a question of international law a Court has applied the rule of relation back, and certainly there are dicta of Lord President Inglis which seem to point completely the other way. Of course that would not prevent the matter being dealt with in the United Kingdom by means of positive enactment. I entirely concur with what fell from the noble and learned Lord on the woolsack as to the true meaning of s. 117.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 23, 1910

Solicitors: *Heath & Hamilton; Julius A. White*

Case Name:
Stewart Estate v. Cartwright

Between
Eunice Fanny Fantom, Executrix of the Estate of Ellen Donaldson Stewart, plaintiff, and
Kathleen Cartwright, defendant

[2001] BHS J. No. 60 1999 No. 1375

Bahamas Supreme Court, Equity Side
Longley J.

July 7,2001.

Counsel:

Forbes, for the plaintiff.
Horton, for the defendant.

DECISION

LONGLEY J.:— Having duly considered the submissions and evidence adduced on behalf of the respective parties I am unable to conclude, that the unrecorded deed dated 14th June 1919 on which the defendant relies to assert her claim to the property was ever delivered for it to be an effective and effectual disposition of the purported grant. It is a matter of trite law that for a deed to: be effective, in law if must be delivered. Evidence of delivery may be director circumstantial. The alleged grantor and grantee having died, and long since so, no direct evidence has been adduced to establish that the deed was delivered or intended to be delivered by the grantor. The battle lines were drawn on the issue as to whether or not the facts and circumstances which were adduced were in and of

themselves sufficient to permit the court to draw the inference that the deed was delivered.

In this connection I shall deal with the point raised by Mr. Horton and referred to in Halsbary. It is this. That once a document purporting to be a deed Is sealed delivery may be presumed in the absence of any evidence that the document was delivered in escrow. A careful review of the cases cited in support of that proposition, however, clearly reveal that it is their stated to broadly. That a document purporting to be a deed has been sealed is but one of the factors which the court may take into consideration, having regard to all the circumstances of the case, to decide whether or not to draw the inference that the deed was delivered so as to make it effectual. In Hall and Bainbridge (1843) 12 QB 699 for example which is cited in support of the proposition which is relied on by counsel for the defendant, Mr. Horton, it was clear that there were or existed a multiplicity of factors, including sealing, which permitted the court or jury to draw the irresistible inference on the facts and circumstances of that case that there had been delivery.

No doubt, one of the compelling factors in Hall and Bainbridge - missing in this case - was the fact that the deed had been in the hand of the person in whose favour it was executed. In this case, the source of the deed is unclear. It was produced by an attorney who deponed in an affidavit that he had found it among papers belonging to the defendant's father. Just how the defendant's father came in to possession of that deed is unclear and is not disclosed by the evidence.

However, other more compelling circumstances militate against the drawing of the inference intended for by the defendant. The deed itself purports to have been executed some nine years before the alleged grantor

executed her will and some forty years before the grantee who is the grantor's executor executed his will and probated the will of the grantor. Nothing in any of those documents suggests that the grantor had conveyed the property in question to the grantee or that the grantee was cognizant of ownership of such a property. In fact or the evidence before me there is nothing to suggest given what the grantor did many years after purportedly conveying this properly suggest that she did not still consider herself to be the owner of the property as she purported to make dispositions in her will which were adverse to the interest supposedly disposed of by the deed.

The affidavit in support of the application sworn by Mr. P, L. Adderley bears this out Paragraphs 5 through 13 are here set out

"5. The said late Clementina Fanny Anderson and her husband resided at No. 19 Cumberland Street which was their home which adjoined to the south the other two storey house which was rented and owned by the said late Clementina Fanny Anderson.

6. By an unrecorded document dated the 14th June 1919 the said late Clementina Fanny Anderson purportedly conveyed to her husband the said late Charles Osborne Anderson a "half interest or moiety" in:

"All that lot of land and premises situate in Cumberland Street in the city of Nassau in the said Island of New Providence and bounded as follows fronting west on Cumberland Street on the north by land of the said Clementina Fanny Anderson on the east by land o:

BEST AVAILABLE COPY

M. H. Jellicoe and others and on the south by land of Alexander W. Cunningham",

7. Nine years later the said late Clementine Fanny Anderson made her last will dated the 25th June 1928 by which she made the following specific devises:

"I will and bequeath to my husband Charles Osborne Anderson a life interest in all of which I die possessed.

To my 3On Charles Wakefield Anderson I will and bequeath to him and his lawful children should he have any - the property immediately to the south of and adjoining the one in which I am now residing. He is not to sell mortgage or in any way part with the property but a portion of the rent is regularly to be set aside for the upkeep thereof.

Should he die without lawful Issue then It is to go to his sister Mary Ida Anderson.

To my daughter Mary Ida Anderson, I will and bequeath the house In which I am now residing 19 Cumberland Street she is not to sell mortgage or In any way part with any of the property

To her and her children should she have any, should she have no children then her property is to go to her brother. Should both of them die without lawful Issue then the whole property is to be divided between my cousin Hilda Wood at Grand Turk,

> Turks Island, and my cousin Nellie Stewart in New South. Wales, Australia".

not have attended to the other details to ensure that no question could arise as to whether or not the dead had ever been delivered. I think there is merit in his submission.

On the whole of the evidence I am not satisfied that any inference can be drawn that this deed was delivered and I would so hold.

In the circumstances, I would have to answer the question posed in the originating summons in the affirmative.

Cost to the plaintiffs to be taxed if not agreed.

LONGLEY J.

Excerpts from the Bahamas Fraudulent Dispositions Act, 1991

An Act to Amend the Law Relating to Dispositions made with an Intent to Defraud.

Enacted by the Parliament of the Bahamas.

2. Interpretation.

"creditor" means a person to whom an obligation is owned.

***

"intent to defraud" means an intention of a transferor willfully to defeat an obligation owed to a creditor;

"obligation" means an obligation or liability (which shall include a contingent liability) which existed on or prior to the date of a relevant disposition and of which the transferor had notice;

"relevant disposition" means a disposition to which section 4(1) applies;

"transferor means the person to whom a relevant disposition is made and shall include any successor in title;

"undervalue", in relation to a disposition of property, means –

(a) the provision of no consideration for the disposition; or

(b) a consideration for the disposition the value of which in money or

money's worth is significantly less than the value of the property
the subject of the disposition.

*****

4. Avoidance of fraudulent dispositions.

4.(1) Subject to the provisions of this Act, every disposition of property made with an intent to defraud and at an undervalue shall be voidable at the instance of a creditor thereby prejudiced.

(2) The burden of establishing an intent to defraud for the purposes of this Act shall be upon the creditor seeking to set aside the disposition.

(3) No action or proceedings shall be commenced pursuant to this Act unless commenced within two years of the date of the relevant disposition.

THE STATUTE LAW OF THE BAHAMAS

1799-1987

IN FORCE ON THE

30th June, 1987

As amended by the Statute Law Revision Act, 1987

REVISED EDITION

Prepared under the authority of The Law Reform and Revision Act, 1975

BY

SIR GORDON BRYCE, C.B.E.
of the Middle Temple, Barrister-at-Law

IN EIGHT VOLUMES AND A SUPPLEMENTARY VOLUME

VOLUME III

Containing Chapters 91 to 177

PUBLISHED BY THE GOVERNMENT OF THE COMMONWEALTH OF THE BAHAMAS

PRINTED BY

A Wheaton & Co Ltd. Exeter

1988

CHAPTER 175

REGISTRATION OF RECORDS.

AN ACT RELATING TO THE REGISTRATION OF RECORDS.

[26th March, 1928.
[Commencement 2nd July, 1928.

1. This Act may be cited as the Registration o Records Act.

2. In this Act, unless the context otherwise requires -

"book" or "book of record" means --

(a) a book in which deeds, documents or other writings accepted for record are copied; or

(b) a roll of film upon which deeds documents or other writing accepted for record are reproduced by means of microphotography;

"deed" means documents of title to land under seal not otherwise specifically mentioned in section 3 o this Act;

"document" means any document other than a deed, or promissory notes and bills of exchange not under seal, and which is not otherwise specifically mentioned in section 3 of this Act;

"Registrar" means the Registrar General and includes the Deputy Registrar General;

"Registry" means the Registrar General's Department.

3. (1) The following deeds, documents and other writings may be recorded upon authentication thereof being first made as provided by this Act --

Class A. Deeds.

Class B. Documents.

Class C. Freehold and leasehold grants from the Crown, certificates of naturalization, letters patent, poor settlers licences and any document under the Public Seal or the Seal-at-Arms.

* * *

shall be admitted as evidence in any court of law or equity in The Bahamas without any further proof:

Provided that in the case of wills referred to in Class E in section 3 of this Act the certificate on any such document shall specify the fact that the same has not been admitted to probate.

10. If any person after having made and executed any conveyance, assignment, grant, lease, bargain, sale or mortgage of any lands or of any goods or other effects within The Bahamas, or of any estate, right or interest therein, shall afterwards make and execute any other conveyance, assignment, grant, release, bargain, sale or mortgage of the same, or any part thereof, or any estate, right or interest therein; such of the said conveyances, assignments, grants, releases, bargains, sales or mortgages, as shall be first lodged and accepted for record in the Registry shall have priority or preference; and the estate, right, title or interest of the vendee, grantee or

mortgagee claiming under such conveyance, assignment grant, release, bargain, sale or mortgage, so first lodge and accepted for record shall be deemed and taken to b good and valid and shall in no wise be defeated o affected by reason of priority in time of execution of an other such documents:

Provided that this section shall not apply to an disposition of property made with intent to defraud.

11. (1) The person executing and every witness to an deed, document or other writing which may be recorde under this Act shall, upon reasonable request in writin personally served upon him by or on behalf of any person requiring any such deed, document or other

* * *

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TOC: Restatement 2d. Conflict of Laws - Rule Sections > /.../ > Title A- Conveyances > § **223 Validity and Effect of Conveyance of Interest in Land**

Citation: RESTAT CONFLICT LAWS SECOND 223

Restatement of the Law, Second,
Conflict of Laws, § 223

Restatement of the Law, Second, Conflict of Laws
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Case Citations

Chapter 9 - Property

Topic 2 - Immovables

Title A - Conveyances

Restat 2d of Conflict of Laws, § 223

§ 223 Validity and Effect of Conveyance of Interest in Land

(1) Whether a conveyance transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs.

(2) These courts would usually apply their own local law in determining such questions.

COMMENTS & ILLUSTRATIONS: Comment:

a. Rationale. All choice-of-law rules should be derive from the principles stated in the rule of § 6. The rule o this Section is derived from those principles looking t furtherance of the needs of the interstate an international systems, application of the law of the stat of dominant interest, protection of justified expectations certainty, predictability and uniformity of result and eas in the determination and application of the law to b applied.

Issues falling within the scope of the rule of this Sectio are the capacity of the party who conveys to make a effective conveyance, the capacity of the party to whon the conveyance is made to acquire the interest involved the formal validity of the conveyance, the validity of th conveyance in other respects, and the nature of th interest transferred. These issues are discussed i Comments *c-g.*

b. Applicable law. Issues falling within the scope of th rule of this Section will be determined by the law tha would be applied by the courts of the situs. If these court would have looked to their own local law for the decisio of the case, that law will be applied by the forum. I however, these courts would have decided the question b reference to the local law of some other state, the forun will do likewise (see § 8).

Whether the courts of the situs would decide the case i accordance with their own local law may depend upon th precise issue involved. These courts would apply thei own local law to determine issues in which the situs ha the dominant interest. Examples of such issues are wh may own the land, the conditions under which land ma be held and the uses to which land may be put. So thes courts would apply their own local law to determine wha

restrictions, if any, are imposed upon the ownership of land by a corporation or by an alien and the period during which the power to alienate interests in land may be suspended. These courts would also apply their local law rule to determine such issues as whether the land must be used for residential purposes only or whether it can be put to a commercial use.

The courts of the situs would also frequently apply their local law to determine issues in which it might be thought that the situs does not have the dominant interest. In the normal course of events, transactions involving land are not entered into until considerable thought has been given by the parties and their lawyers to the possible consequences. This is an area where it is peculiarly important that there be certainty, predictability and uniformity of result and ease in the determination and application of the law to be applied. For these reasons, the courts of the situs would apply their local law in situations where it is likely that a person relied on the record title before entering into a transaction involving interests in local land. Likewise, considerations of convenience make it desirable that a prospective purchaser and his agents, such as draftsmen and title searchers, need consult only a single law and that the one with which they are most familiar. This latter point may be illustrated by an example. Suppose that in state X, where both A and B are domiciled, A gives B a deed to land in state Y and that thereafter the question arises before a Y court whether A had the requisite capacity to do so. It could be argued in support of application by the Y courts of X local law to determine this question of capacity that X is the state which has the dominant interest in the determination of this issue. But such a decision would complicate the task of title searchers and of other persons concerned with Y land. Thereafter, they could not always safely restrict their attention to Y local law in determining the capacity of a transferor of Y land.

There would be situations, perhaps uncertain both in their nature and extent, where the local law of one or more other states would have to be consulted.

For all of these reasons, the courts of the situs would usually apply their own local law to determine questions involving the conveyance of an interest in the land.

On the other hand, situations will arise where the courts of the situs would not apply their own local law to the decision of a particular issue. So, as stated in Comments *c-d,* these courts might hold that a statutory rule of incapacity applies only to local domiciliaries or to domestic corporations and is not applicable to foreign transferors or transferees. Thus, these courts might hold that a statute which restricts testamentary gifts to charities in order to protect the members of the testator's family applies only to local testators and does not restrict a foreign testator's power to devise local land. Likewise these courts might feel that local interests were not involved in a disposition to be made outside the state of the proceeds of the sale of local land. Hence, when by the terms of a conveyance the transferee is directed to sell local land and to dispose of the proceeds in a particular way outside the state, the courts of the situs might not apply their own local law to determine the validity of the particular disposition (see §§ 239, 278).

There may also be occasions when the courts of the situs would apply the local law of another state on the ground that the concern of that other state in the decision of the particular issue is so great as to outweigh the values of certainty and convenience which would be served by application of the local law of the situs. So the situs courts might apply the local law of the state of the spouses' domicil to determine certain issues involving the conveyance of interests in local land from one spouse to the other, and this is particularly likely to be so when the

land is one item in an aggregate of things, both movable and immovable, which are situated in a number of states and which it is desirable to deal with as a unit.

Whichever law would have been applied by the courts of the situs in the decision of the particular issue will likewise so be applied by the forum. To date, the courts of the situs have usually applied their own local law to determine the validity of a conveyance of an interest in land. On occasion, however, these courts have applied the local law of another state, particularly in the case of certain questions involving testamentary transfers (see § 239) and transfers in trust (see § 278).

c. *Capacity of transferor.* For reasons stated in Comment *b,* the courts of the situs would usually apply their own local law to determine the capacity of the transferor to make a valid conveyance of an interest in the land. These courts might hold, however, that some rule of incapacity is applicable only to local domiciliaries or to local corporations and hence does not affect a foreign transferor. These courts might also apply the local law of another state on the ground that the concern of that other state in the decision of the particular issue Is so great as to outweigh the values of certainty and convenience which would be served by application of their own local law. So the courts of the state where the land is might on occasion apply the local law of the state of the spouses' domicil or of the domicil of parent and child to determine the capacity of one of these parties to convey an interest in the land to the other.

d. Capacity of transferee. The situs has an obvious interest in the question who may hold title to interests in local land. For this reason, and for the other reasons stated in Comment *b,* the courts of the situs would usually apply their own local law to determine the capacity of the transferee to take and hold an interest in

local land. These courts might hold, however, that a loca statutory rule of incapacity applies only to domesti corporations and is not applicable to foreign corporations These courts might also apply the local law of anothe state because of the greater concern of that state in th determination of the particular issue. So, these court might hold that a conveyance to a foreign corporation i invalid if the corporation lacked capacity under the loca law of the state of its incorporation to take and hold a interest in the land.

e. *Formalities.* As here used, the term "formalities' applies to such requirements as those of a writing, of a seal, of witnesses and of acknowledgment. In the absenc of statute, the courts of the situs would usually appl their own local law to determine questions involving th formalities necessary for the validity of a conveyance o an interest in land. In the case of testamentary transfers however, statutes in many states provide that a wil devising an interest in local land shall be held valid wit respect to formalities if it complies with the requirement of the state where the will was executed or of some othe state. These statutes represent a legislativ determination that the reasons stated in Comment *b* fo application of the local law of the situs are outweighed o this occasion by the desirability of upholding the validit of a conveyance with respect to issues of form. Even i the absence of statute, the courts of the situs might o occasion uphold the validity of a conveyance with respec to issues of form by application of the local law of som other state in situations where the requirements of for of the situs have been satisfied in substance.

f. Other questions of validity. Frequent questions involving aspects of validity other than capacity an formalities, relate to illegality, the rule agains perpetuities, fraud as between parties to the conveyanc and fraud as against third persons, such as in the case o

a conveyance in fraud of creditors. Usually, the courts of the situs would apply their own local law to determine such questions.

The situs has a substantial interest in determining the uses to which the land may be put and the conditions under which the land may be held. Hence the courts of the situs would almost invariably apply their own local law to determine whether a contemplated use of the land was, or was not, illegal. On the other hand, these courts, unless prohibited by a strong public policy, might apply the local law of another state to determine certain questions of illegality in a situation where the land is to be sold and the proceeds transmitted to the other state. Similarly, the courts of the situs would almost invariably apply their own local rule against perpetuities to determine whether an interest sought to be created in the land by the conveyance cannot take effect because the power of alienation is suspended for too long a period. On the other hand, again, these courts might apply the rule against perpetuities of another state in a situation where the land is to be sold and the proceeds transmitted to the other state and the conveyance is valid under the rule against perpetuities of the other state but not under the rule of the situs.

g. Effect of conveyance. The courts of the situs would usually apply their local law to determine the nature of the interest in land transferred by the conveyance. So these courts would usually apply their local law to determine such questions as whether equities and unrecorded titles are cut off by a conveyance, whether a conveyance without the use of words of inheritance passes a fee simple or a life estate and whether a conveyance has created a legal or an equitable estate.

h. Non-possessory interests in land. The courts of the situs would usually apply their local law to determine

questions relating to the creation, transfer or terminatior of non-possessory interests in land, such as easements profits and licenses. These courts might hold, however that some statutory rule, such as one relating to capacity is applicable only to local domiciliaries and to domesti corporations and does not affect other persons (see Comments *c-d).* These courts might apply the local law o another state in still other circumstances on the groun that the concern of this state in the decision of the particular issue is so great as to outweigh the values o certainty and convenience which would be served by application of their local law.

Whether a covenant runs with the land, and what effec its running may have on other interests in the land, wil be determined by the law that would be applied by the courts of the situs. On the other hand, a covenant may create purely contractual obligations between the parties to the instrument. What law governs a covenant of the latter sort is considered in § 190.

For the distinction between possessory and non possessory interests in land, see the Restatement o Property § 7.

i. Collateral questions. As stated in the precedin Comments, the courts of the situs would usually apply their local law to determine whether a conveyanc transfers an interest in land and the nature of the interest so transferred. On the other hand, these court might apply the local law of some other state t determine questions that are incidental or collateral t the conveyance. So when, for example, A brings sui against B in state X to cancel a deed to X land which h claims he delivered to B in state Y by reason o misrepresentations made to him by B in Y, the X cour would probably apply Y local law in determining whethe B's conduct amounted to actionable fraud (see § 148). Or

if the basis of A's claim is that B obtained delivery of the deed in breach of a fiduciary obligation owed A, the X court would probably apply the local law of the state having the most significant relationship to the parties with respect to the particular issue in determining whether B did owe A a fiduciary obligation and, if so, whether this obligation was breached.

A similar approach might be taken in such circumstances by the courts of some state other than that of the situs. These courts would apply the law that would be applied by the courts of the situs in determining whether an interest in land has been transferred by the conveyance and the nature of that interest. On the other hand, these courts might apply the local law of some other state in determining whether to order the defendant to convey or to reconvey to the plaintiff the interest in land. If, in obedience to the order, the defendant were to give the plaintiff a deed to the land, the deed would be recognized as valid and effective by the courts of the situs. And, even if the defendant did not give a deed to the plaintiff, the decree ordering him to do so would, in all probability, be enforced by the courts of the situs (see § 102, Comment *d*).

Suppose, for example, that in an action brought in state X it is claimed that A in X gave B a deed to land in state Y in fraud of creditors. In such an action, the X court would determine, if the question were to arise, whether an interest in the Y land had been transferred to B in accordance with the law that would be applied by the Y courts. On the other hand, the X court might well look to X local law in determining whether the deed had in fact been given in fraud of creditors and if so, whether B should be ordered to reconvey his interest in the Y land (see § 145). Similarly, if it is claimed that, in breach of his contract with C, A in state X gave B a deed to land in state Y, that B took the deed with notice of A's contract

with C, and that A, B and C are all domiciled in X, an
court might look to X local law in determining whether i
should order B to convey the land to C (see § 188)
Likewise, a court of state X in an action for divorc
between spouses domiciled in X might apply X local lav
in determining whether to order the husband to convey t
his wife land owned by him in state Y.

Illustration:

1. In a divorce proceeding brought by W against H i
state X, W seeks an order requiring H to deed to her hi
interests in land in state Y. H and W are both domicile
in X; W is entitled to the relief sought under X local lav
but not under the local law of Y. Among the questions fo
the X court to determine are whether X or Y has th
dominant interest in the determination of the particula
issue and whether the X court can give W effective relie
As to the first question, it would appear that X is th
state of dominant interest. The purpose of the X rul
would clearly be furthered by its application to spouse
domiciled in X whereas it is doubtful that any interest o
Y would be served by application of the Y rule, whic
presumably is directed, at least primarily, to spouse
domiciled in Y. Also the Y recording system would not b
affected if the X court were to apply X local law and orde
H to deed to W his interests in the Y land. This is becaus
the transfer would not be effective against third person
until the transfer from H to W had been recorded in Y i
accordance with the Y requirements. Finally, an order b
the X court requiring H to convey the land to W woul
probably be given effect in Y. This would clearly be so I
H obeyed the order and gave W a deed to the Y land. Bu
even if H disobeyed the order and failed to give W a deed
the order of the X court would in all probability b
enforced in Y (see § 102), Under the circumstances, the
court could appropriately apply the X rule and order H t
convey the Y land to W.

Comment:

j. As to the law governing testamentary transfers and transfers in trust of an interest in land, see §§ 239, 278.

k. A state with personal jurisdiction over the transferee may order him to convey the land to the transferor or to a third person as an equitable remedy for some breach of trust or other wrong that the transferee has committed (see § 53).

l. Failure to *record.* The courts of the situs would apply their own local law to determine the effect as to third persons of a failure duly to record a conveyance.

REPORTERS NOTES: See generally 2 Beale, Conflict of Laws 938-941 (1935); Cheshire, Conflict of Laws 587-603 (6th ed. 1961); Dicey, Conflict of Laws 519-543 (8th ed. 1967); Ehrenzweig, Conflict of Laws 507-616 (1962); Goodrich, Conflict of Laws 293-296 (Scoles, 4th ed. 1964); Stumberg, Conflict of Laws 342-348 (3d ed. 1963).

Comments b-d: A local rule of incapacity has been held inapplicable by the courts of the situs to foreign transferors or transferees. Proctor v. Frost, 89 N.H. 304, 197 A. 813 (1938); Mayor of Canterbury v. Wyburn [1895] 1 Ch. 83; Hancock, In the Parish of St. Mary le Bow, in the Ward of Cheap, 16 Stan.L.Rev. 561 (1964); Hancock, Equitable Conversion and the Land Taboo in Conflict of Laws, 17 Stan.L.Rev. 1095 (1965); Hancock, Full Faith and Credit to Foreign Laws and judgments in Real Property Litigation, 18 Stan.L.Rev. 1299 (1966); Hancock, Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws, 20 Stan. L.Rev. 1 (1967).

A local restrictive rule has been held inapplicable by the courts of the situs to a disposition to be made outside the state of the proceeds of the sale of local land. Hope v.

Brewer, 136 N.Y. 126, 32 N.E. 558 (1892) and Hancock
In the Parish of St. Mary le Bow, in the Ward of

DICEY AND MORRIS

ON

THE CONFLICT OF LAWS

ELEVENTH EDITION

UNDER THE GENERAL EDITORSHIP OF

LAWRENCE COLLINS
M.A., LL.B., LL.M.

WITH

SPECIALIST EDITORS

VOLUME 2

LONDON
STEVENS &. SONS LIMITED
1987

3. *CHOICE OF LAW*

Rule 118.[28] —All rights over, or in relation to, an immov able (land) are (subject to the Exception hereinafter men tioned) governed by the law of the country where the immovable is situate *(lex silus).*

COMMENT

As a general rule, all questions that arise concernin rights over immovables (land) arc governed by the law o the place where the immovable is situated *(lex situs).* The general principle is beyond dispute, and applies to right of every description. It is based upon obviou considerations of convenience and expediency. Any othe rule would be ineffective, because in the last resort lan

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[28] Falconbridge, Chaps. 30, 35, Cook, Chap. 10; Hancock (1964) 16 Stanford L. Rev. 561; (1965) 17 *ibid.* 1095 (1966) 18 *ibid.* 1299; (1967) 20 *ibid.* 1; Weintraub (1966 52 Cornell L.O. 1; *Nelson v. Bridport* (1846) 8 Beav 547 *Adams v. Clutterburk* (1883) 10 Q.B.D. 403; *Bank o Africa Ltd v. Cohen* (1909) 2 Ch 129 (C.A.); *Re Mille* (1914) 1 Ch. 511; *Re Anziani* (1930) 1 Ch. 407, 424; se also *Scott v. Nesbiu* (1808) 14 Ves. 438 (creditor's lien) *Hanson v. Walker* (1829) 7 L.J. (o.s.) Ch. 135 (priority o creditors); *Harrison v. Harrison* (1873) L.R. 8 Ch.App 342 (liability for debts); *Ballryant v. Walford* (1887) 3 Ch.D. 269 (C.A.) (liability for waste).

This Rule is only intended to apply to particula transfers of immovables made *inter vivos*, e.g. by way o sale, lease or mortgage. It does not refer to genera transfers made in consequences of marriage (see Chap 28) or bankruptcy (see Chap. 30), or to transfers made o death (see Chap. 27)

can only be dealt with in a manner which the *lex situs* allows.

Rule 118 applies in principle not only to English, but also to foreign immovables (land), to the limited extent[29] that English courts are called upon to determine rights over foreign land, or (which is more likely) over money in England which represents the proceeds of sale of foreign land. Their decision must be governed by the *lex situs*—i.e. the law of the country (e.g. France) where the land is situate. But it must be remembered that the *lex situs,* or law of France, means not necessarily the domestic law of France, but any law which the French courts would apply to the decision of the particular case, which might under certain circumstances be the domestic law of same other country, *e.g.* of England. Writers on the conflict of laws are accordingly almost unanimous that, so far as foreign land is concerned, the *lex situs* means not the domestic law of the *situs* but the conflict of laws rule of the *situs,* which may refer to some other system of domestic law[30]. In truth an English court in the rare cases when it determines rights in respect of foreign land follows the *lex situs* almost of necessity. The sovereign of the country where land is situate has absolute control over the land within his dominions: he alone can bestow effective rights over it; his courts alone are, as a rule, entitled to exercise jurisdiction over such land. Consequently, any decision by an English court which ran

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[29] See Rule 117, *ante*.

[30] Cheshire and North, pp. 75, 504; Falconbridge, pp. 141, 216-217; Cook, pp. 264, 279-280; Griswold (1938) 51 Harv.L.Rev. 1165, 1202; see *ante*, pp. 83-84; *Re Ross* (1930) 1 Ch. 377; *Re Dukes of Wellington* (1947) Ch 506; (1948) Ch. 118 (C.A.).

counter to what the *lex situs* had decided or would decide would be in most cases a *brutum fulmen.*[31]

Indirectly, of course, a foreign immovable may be affected by a judgment of an English court *in personam* ordering some person subject to the control of the court to execute a conveyance or mortgage.[32] The converse, however, may not be true, for it has been held in Canada that no effect will be given to a decree of a Californian court ordering reconveyance of land in British Columbia on the ground of fraud.[33]

Now, if the *lex situs* means, for an English court dealing with foreign land, that system of domestic law which the *lex situs* would apply, it follows that Rule 118 furnishes no guide whatever for an English court dealing with land in England, unless it is first assumed that the word "law" in the Rule means—contrary to its meaning when foreign land is in question—English domestic law and not English conflict of laws rules.[34] For to assert that an English court will apply whatever system of domestic law English conflict of laws rules would apply is, of course, to say precisely nothing. Accordingly, it has been contended[35] that this assumption ought not to be made, and that, when the English court is dealing with the effect on land in England of deeds and wills executed

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[31] See *ante*, pp. 83-84.

[32] Rule 117(2)(a), *ante*, pp. 923-924, 928-931.

[33] *Duke v. Andler* [1932] 4 D.L.R. 529; *cf. Haspel* v. *Haspel* [1934] 2 W.W.R. 412; *ante*. 458-459.

[34] Cook, p. 264

[35] Cook, pp. 264-281.

abroad or by persons domiciled abroad, there is room for applying some system of law other than English law (e.g. the *lex loci actus* or the *lex domicilii)*, so far as concerns capacity and formalities. There is much force in this argument. But the English habit of applying English domestic law to all transactions affecting land in England is so inveterate that it seems unlikely that English courts would be prepared to apply any other law to questions of capacity or form.

(1) Capacity. A person's capacity to alienate an immovable by sale or mortgage *inter vivos* is governed by the *lex situs.*[36] The *lex situs* means, for an English court dealing with land in England, English domestic law, and means, for an English court dealing with land abroad, whatever system of domestic law the *lex situs* would apply.

There appears to be no English case in which the court has had to consider the question of capacity to transfer land in England, the transferor being domiciled abroad.[37]

Capacity to transfer land situated abroad is governed by whatever system of the *lex situs* would apply. There is one English authority for this proposition, but

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[36] *Bank of Africa* v. Cobert [1909] 2 Ch. 129 (C.A.); *Bondholders Securities Corporation v. Manville* (1933) 4 D.L.R. 699. *Landreau v. Lachapelle* (1937) 2 D.L.R. 504; Illustrations 1-2, *post*, p. 940.

[37] See *Froctor v. Frost*, 89 N.H. 304, 197 A. 813 (1938), and comment thereon by Cook, pp. 270-276, and Hancock (1967) 20 Stanford L.Rev. 1, 31; *Landreau v. Lachapelle* (1937) 2 D.L.R. 504, and comment thereon by Falconbridge, pp. 629-631.

the reasoning was not very satisfactory, and it may ever be that the decision was wrong in the result. In *Bank of Africa v. Cohen*[38] W, a married woman resident and domiciled with her husband in England, executed a deed in England by which she agreed to mortgage land in Johannesburg to an English bank as security far past and future advances made and to be made by the bank to her husband. The bank sued for specific performance of the deed. W's defence was that by the Roman-Dutch law in force in the Transvaal, a married woman was incapable of becoming surety for her husband unless (a) she obtained a pecuniary benefit from the contract, or (b) she was engaged in trade, or (c) she dearly and specifically renounced the benefits of certain provisions of Roman-Dutch law. None of these exceptions applied, but the trial judge found that W knew quite well what she was doing. It was held by Eve J. and the Court of Appeal that W's capacity to make the contract was governed by the law of the Transvaal and the contract was invalid. The following observations are submitted:

(i) The court was not dealing with a mortgage, but with a contract to make a mortgage. It is well settled that contracts dealing with land are governed by their proper law, which is usually (but not necessarily) the *lex situs*.[39] The court made no attempt to ascertain the proper law of the contract.

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[38] (1909) 2 Ch. 129 (C.A.), critaciaed by Cheshire and North, pp. 506-507; Falconbridge, p. 629. C.F. *Gregg v. Perpetual Trustee Co.* (1918) 18 S.R.N.S.W. 252; *Bondholders Securities Corporation v. Manville* (1933) 4 D.L.R. 699. Contrast *Re Courtney*, Ex P. Pollard (1840) Mont. & Ch. 239.

[39] Exception. *Post*, p. 941.

(ii) The court made no attempt to ascertain the policy of the Transvaal law, or how the Transvaal courts would deal with this very case. Had it done so, it might have discovered that the Transvaal law laid down a policy for Transvaal married women and not for Transvaal land, and that the Transvaal law did not apply to a contract made in England by a domiciled English woman. In that case, it is submitted that the English court should have applied domestic English law, as being the law which the *lex situs* would have applied.

(iii) The decision lost sight of the economic and social considerations involved. The bank was left without security for advances made to H in reliance on W's promise; and W was allowed to break her promise with impunity, although she made it in solemn form and knew quite well what she was doing.

Capacity to take land is no doubt governed by the *lex situs,* which means, for an English court dealing with land in England, English domestic law, and means, for an English court dealing with foreign land, whatever system of law the *lex situs* would apply.[40] Perhaps the most striking illustration of this principle is the former rule, abolished in 1870,[41] that an alien could not own land in England.

(2) Formalities. The question whether a conveyance of land is formally valid must be determined in accordance with the *lex situs.*[42] The *lex situs* means, for

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[40] *Duncan v. Lawson* (1889) 41 Ch.D. 394; *Att. - Gen v. Parsons* (1956) A.C. 421.

[41] Naturalisation Act 1870. s. 2.

[42] *Adams v. Clutterbuck* (1883) 10 Q.B.D. 403; Illustrations 3-5, *post*, pp. 940-941.

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an English court dealing with land in England, English domestic law, and means, for an English court dealing with land abroad, whatever system of domestic law the *lex situs* would apply.

A contract relating to land is formally valid if it complies with the formalities prescribed by the proper law of the contract or *(semble)* by the *lex loci contractus.*[43] The proper law of the contract is usually, but not necessarily, the *lex situs.*[44] So a conveyance of land in England, executed abroad by a person domiciled abroad, would not be valid as a conveyance unless it complied with the formalities prescribed by English domestic, law, *i.e.* unless it was made by deed; but it might be valid as a contract to convey, of which specific performance might be given, if there was a note or memorandum in writing or some act of part performance sufficient to satisfy section 40 of the Law of Property Act 1925.

(3) Material or essential validity. [45]Although the cases all concern wills, there can be no doubt that the material or essential validity of a disposition of land is governed by the *lex situs.* The *lex situs* means, for an English court dealing with land in England, English domestic law, and means, for an English court dealing with land abroad, whatever system of domestic law the *lex situs* would apply. Interpreted in this sense, the *lex situs* determines what estates can legally be created,[46] what are the incidents of those estates,[47] whether the

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[43] Rule 183.

[44] Exception, *post*, p. 941; Rule 188.

[45] See Illustrations 6 and 7, *post*, p. 941.

[46] *Nelson v. Bridport* (1846) 8 Beav. 547.

interests given infringe the rule against perpetuities or accumulations,[48] whether gifts to charities are valid,[49] and so on.

The material or essential validity of a contract dealing with land is, however, governed by the proper law of the contract, which is usually, but not necessarily, the *lex situs*.[50]

(4) Prescription and limitation.[51] The question whether the possessor or occupier of an immovable or land has or has not acquired a title thereto by lapse of time, *i.e.* by prescription,[52] is to be determined in accordance with the *lex situs*, and this is so whether the land is situate in England or in a foreign country, *e.g.* France. Likewise, since the Foreign Limitation Periods Act 1984,[53] the *lex situs* also decides whether such a possessor or occupier has acquired by lapse of time a defence against an action or other proceeding for the recovery of the land under a law (statute of limitations]

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[47] *Re Miller* (1914) 1 Ch. 511.

[48] *Freke v. Carbery* *1873) L.R. 16 Eq. 461; *Re Grassi* (1905) 1 Ch. 584, 592.

[49] *Duncan v. Lawson* (1889) 41 Ch.D. 394; *Re Hoyles* (1911) 1 Ch. 179 (C.A.).

[50] See the Exceptions to this Rule, *post*, p. 941.

[51] See Illustrations 8, *post*, p. 941.

[52] *Re Peat's Trusts* (1869) L.R. 7 Eq. 302; *Pitt v. Decre* (1876) 3 Ch.D. 295.

[53] *Ante*, pp. 190-191.

which bars the *remedy* of the person otherwise entitled tc recover it.[54]

ILLUSTRATIONS

(1) CAPACITY

1. A man aged twenty is domiciled in the Netherlands, by the law of which he is a minor. He owns freehold land in England. He is under English law an adult His capacity to convey the land is unaffected by the fact that he is a minor by the law of his foreign domicile.

2. A foreign corporation is formed under the Law of the Republic of Ireland for the purchases of land, and with a right under that law to hold land. The capacity of the corporation to hold land in England is governed by the law of England.[55]

(2) FORMALITIES

3. A domiciled Englishman conveys to a purchaser domiciled in England a right of shooting over lands in Scotland. The conveyance is made by an instrument in

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[54] This may have been the position even before the 1984 Act: see *Re Pear's Trusts* (1869) L.R. 7 Eq. 302; *Pill v. Dacre* (1876) 3 Ch.D. 295; see also *Colonial Investment and Loan Co. v. Martin* (1928) 3 D.L.R. 784. *Pitt v. Dacre* may, however, be explained on the ground that, as the Real Property Limitation Act 1833 only applied to land in England, there was no applicable statute of limitation of the forum (England) or the *situs* (Jamaica), the *les fori* and the *lex situs* this coinciding.

[55] *See Att. Gen. v. Parsons* (1956) A.C. 421. See as to corporation, Chap. 31, *post*, especially pp. 1134-1135.

writing but not under seal. The law of England does, but the law of Scotland does not, require such a conveyance to be under seal. The conveyance is valid, i.e. the forms required are determined by the law of Scotland.[56]

4. A domiciled Scotsman conveys to a purchaser, who is also a domiciled Scotsman the right or shooting over land in England. The conveyance is made by an instrument not under seal. The conveyance is invalid, not being in accordance with the law of England (*lex situs*).[57]

5. A in England mortgages land in British Guiana to B by deed in order to secure a loan. The land is not properly conveyed to B according to the formalities required by the law of British Guiana. A becomes bankrupt and X, his trustee, sells the land and receives the purchase-money for the benefit of A's creditors. The mortgage is void and B cannot claim to rank as a secured creditor.[58]

(3) MATERIAL OR ESSENTIAL VALIDITY

6. A domiciled Frenchman is tenant for life of land in England. His right to deal with the land is governed wholly by the law of England.

7. A domiciled Englishman conveys land in New York upon trusts which infringe the New York rule against perpetuities. The validity of the trusts is determined by whatever law the law of New York (*lex situs*) would apply to the case.

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[56] *Adams v. Clutterbuck* (1883) 10 Q.B.D. 403.

[57] Inference from *Adams v. Clutterbuck, supra.*

[58] *Waterhouse v. Stansfield* (1853) 10 Hare 254.

(4) PRESCRIPTION

8. A agrees with X in England to convey to X land in India. X refuses to accept the conveyance, on the ground that A has not a title to the land. A claims a good title by prescription. In proceedings by A against X to compel X to accept a conveyance the question whether A has a good title must be determined in accordance with the law of India. (*lex situs*).

Exception.[59]—The formal and material validity, interpretation and effect of a contract, and capacity to contract, with regard to an immovable are governed by the proper law[60] of the contract.

The proper law of such a contract is, in general, though not necessarily, the law of the country where the immovable is situate *(lex situs)*.

COMMENT

This Exception relates to the contractual aspects of transactions relating to land which are referred to above[61] and more fully developed in connection with Rule 188.[62]

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[59] See as to this Exception, Rule 188, and Comment thereon; *British South Africa Company v. De Beers Consolidated Mines* (1910) 2 Ch. 502 (C.A.; *Re Smith* (1916) 2 Ch. 206; *Re Anchor Line (Henderson Brothers) Ltd.* (1937) Chr. 483.

[60] For meaning of "proper law of the contract," see Rule 180; as regards capapcity, see Rule 182; as regards form, see Rule 183.

[61] *Anre*, p. 939.

[62] *Post*, p. 1254.

EXCERPTS FROM LAW REVIEW ARTICLES AND TREATISES

David M. Green and Walter Benzija,
Spanning the Globe: The Intended Reach of the Bankruptcy Code
10 Am.Bankr.Inst.L.Rev. 85 (Spring 2002)

At Page 109-110:

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We believe that Congress intended for the Bankruptcy Code to have an extraterritorial reach. What the decisions examined here reveal, however, is that such intent is less than clear; were it otherwise, the need for jurisdictional gyrations would be obviated. The Bankruptcy Code's lack of clarity leads to decisions whose reasoning is decidedly results-oriented. Congress should take the opportunity in the forthcoming bankruptcy reform act to make its intent plain so that the vital goals of the Bankruptcy Code – an orderly distribution of assets and the ability to provide honest debtors with a "fresh start" – may be preserved regardless of the physical location of the debtors property or creditors. Congress can and should provide the necessary tools to pursue or enjoin entities who would seek to undermine the Bankruptcy Code's purposes from afar.

THE CONSTRUCTION OF DEEDS AND STATUTES

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THIRD EDITION

London
SWEET & MAXWELL LIMITED
2 & 3 Chancery Lane W.C.2

1952

THE CONSTRUCTION OF DEEDS AND STATUES

PART I
DEEDS AND OTHER INSTRUMENTS

I.—THE NATURE OF A DEED

In this book it is proposed to set out briefly the main general principles adopted by the Courts in construing, and interpreting deeds (including other instruments) and statutes. The large number of cases extending over centuries bear witness to the fact that this duty of construction is of everyday occurrence in our Courts, and it is therefore important that those who desire to practice the law should have studied the outlines of the subject.

Definition of a deed.— A document is some writing which furnishes evidence or information about something. All deeds are documents, but not all documents are deeds. For instance, a legend in a chalked on a brick wall, or a writing, tattooed on a sailor's back may be documents but they are not deeds. A deed is, therefore, a particular kind of document. It must be in *writing* and a writing on *paper* or its like, *e.g.*, vellum or parchment. Any instrument under seal is a deed made between private people. It must be *signed*, *sealed*, and *delivered*. A deed must either (a) effect a transference of an interest, right, or property, or (b) create an obligation binding on some person, or (c) confirm some act whereby interest, right, or property has already passed. "Writing" includes print.

"A charter of feoffment is a deed ILLEGIBLE power of attorney; a release or disclaimer ILLEGIBLE and say that any instrument delivered as a deed ILLEGIBLE an interest in property or is in affirmance or confirmation of something; whereby an interest or property passes is a deed ILLEGIBLE I by no means say that I have

enumerated all the possible kinds of deeds there may b others"(a)

By the common law signing was not essential to a deed as long as it was sealed and delivered. All people car now either write their names or make their mark, so by section 73 pf the Property Act, 1925, the executant must either sign or place his mark on the deed and sealing alone is not sufficient. Many documents under seal are not deeds, *e.g.*, a diploma of a degree or a certificate of having passed an examination.

Bovill, C.J., said in the case cited (b): "Many documents under seal are not deeds, for instance, an award, though sealed. Again a will is often under seal. So is a certificate of magistrates, a certificate of admission to the College of Physicians or to other learned bodies. So is a share certificate. Yet it can hardly be said that all of these are deeds. The probate of a will is very similar, it is given under the seal, formerly of the ordinary, now of the Court of Probate. It is a certificate of the will having been proved and administration granted; but I never heard it suggested that it is a deed".

Deed, when required (c)—A deed, as opposed to an instrument in writing or document (including books,

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(a) *R. v. Morton* (1873) L. R. & C.C.R. as at p. 371, *per Bovill, C.J.* He omitted contracts under seal, *i.e.*, (b) in the enumeration of the essentials of a deed on p. ILLEGIBLE A memorandum is not a deed, though it may have the effect of a deed. *Re Whitley*ILLEGIBLE, *Ltd.* (1885 as Ch. D. 337)

(b) *Ibid.*

(c) See generally ILLEGIBLE Tenures

maps, plans, drawings and photographs (d)), was required by common law in a ll cases in which writing was necessary, for in olden days it was only by a man's seal that this writing could be evidenced and accordingly the seal of the executant of the writing was essential. So by common law conveyances if incorporeal hereditaments, all releases conditions in defeasance of freeholds, and powers of attorney had to be made by deed. There are also very many statutes requiring deeds for various transactions. A few may be cited that gain and sale, conveyances of corporeal hereditaments; disentailing assurances, dispositions of married women under the Fines and Recoveries Act, 1833; assignments of chattel interests; under various sections of the Conveyancing Act, 1881, and particularly for conveyances and mortgages 9f real property; under the Law of Property Act, 1925, which is s. 52 provides that all conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed with certain exceptions; all mortgages and alienations of contingent or future interests; appointment of new trustees under the Trustee Act, 1925; leases under the Settled Land Act; various instruments under the Land registration Act, 1925; transfer of shares in companies; transfers of British ships or shares in them (Merchant Shipping Act, 1894); and many more of less importance. Equity follows the law as formalities, but, as we shall see, was never hampered by motions of the sanctity of a deed, and in fact never insisted on deeds for matters purely within its own jurisdiction; though equity was often affected by statutes requiring writing, *e.g.*, for the creation of a trust of lands, or the assignment of a trust, required by the Statute of Frauds (ss. 7, 9). As stated above, all conveyances of land or of any interest tnerein must be by deed, subject to certain exceptions, the most important of which are assents by a personal representative; surrenders by

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(d) Evidence Act, ILLEGIBLE

operation of law or which the law does not require to b evidenced by writing, leases or tenancies or other no required by law to be in writing, and conveyances takin effect by operation of law.

Deeds when void or voidable.—As stated above, a conveyance of land not under seal is void; so where a deed is sealed and delivered by the executant under the fraud or misrepresentation of another person so that the former does not know the character of the document which he has executed the deed is void (e). The ILLEGIBLE *actum*—it has not been done—by the person sought to be charged. It applies not only to deeds but to all written contracts (f). If there has been a fraudulent misrepresentation as to the nature of the document, it is a void instrument for all purposes, notwithstanding that rights under it have been acquired by an innocent third partyand although at least in the case of a negotiable instrument the executant was himself guilty of negligence in signing it (g) There is however, this distinction to be drawn, *viz.*, if the executant knows the nature of the document as apart from its contents, he cannot rely on the plea as regards third parties, though the document may be voidable as between the immediate parties

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(e) *National Provincial Bank v. Jackson* (1886) ILLEGIBLE Ch. D. ILLEGIBLE at p. 10, *per* Cotton, L.J.

(f) *Foster v. Mackinnon* (1869) L.R. 4 C.P. 704, 711. ILLEGIBLE *Wesminster Bank v. Wilson* [1938] 3 All E.R. 652.

(g) *Carlise and Cumberland Banking Co. v. Bragg* [1911] ILLEGIBLE 489; *Bank of Ireland v. McMamamy* [1916] 2 Ir. R. 161

thereto (h). In *Jackson's Case* the defendants had trusted their brother who was also their solicitor and who had said nothing to mislead them as to the nature of the instrument they were executing. They knew it dealt in some way with their houses. The deed, therefore, was not a void deed. It had been deposited by the solicitor with the plaintiff bank to secure an advance to himself. As Mellish, L.J., said (i):

"When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a *mere* form, and has such confidence in his solicitor as to execute the deed in ignorance, than a deed so executed, although it may be voidable on the ground of fraud, is not a void deed".

Lunatics.—Formerly the deed of a lunatic was probably not voidable by himself, but is now voidable by his committee or heir; or by himself if the other party knew of his lunacy or such facts about the alleged lunatic that he must be taken to have known of it (*k*). A deed poll by a lunatic so found by inquisition disposing of property

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(h) *National Provincial bank v. Jackson, supra*l; *Hoiaaisad v. Webb* [1906] 1 Ch. ILLEGIBLE, *Play v. Pollard* [1930] 1. K. B. ILLEGIBLE; *Gillman v. Gillman* [1946] 173 L.T. 272; Cl. Chitty; Contracts 20th ed. Appendix.

(i) ILLEGIBLE

(*k*) *Molion v. Camroux* (1848) 5 Ex. 487; (1849) ILLEGIBLE; *Imperial Loan Co. v. Stone* [1892] ILLEGIBLE 599; *York Glass Co., Ltd. V. Jubb* (1925) 42 T. L. R. 1

(*l*) *Re Walker* [1905] 1. Ch. ILLEGIBLE

during a lucid interval is void while the inquisition is in force(*l*), and so is an equitable charge given by a man whose estate is the subject of a receivership order under the Lunacy Act, 1890 (*m*).

Signing—This, as stated above, was not essential (though very usual) till January 1, 1926. Before that date a document was sometimes required to be "under hand and seal" as in the execution of a power, so that signing was essential, through deed, as such, was valid without it. Now by the Law of Property Act, 1925, s. 73, where an individual executes a deed, he *shall* either sign or place his mark upon it and sealing alone shall not be deemed sufficient. For the admissibility of a statement in a "document:" as evidence under the Evidence Act, 1938 (*n*), the document must have been written, made or produced; or signed or initialed by the person deemed to have made the statement; or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

Sealing—An ancient essential of a deed. Before writing became a general accomplishment, a man signified his assent to a document by impressing it with his seal. "No writing without a seal can be a deed", says Sheppard, Touchstone (56). Any seal, however, will do; it need not necessarily be stitute a sealing neither wax nor water nor a piece of paper nor even an impression is necessary" (*o*). As long as some act is done with the intention of sealing, that is sufficient (*o*1).

(*m*) *Re Marshall* [1920] ILLEGIBLE

(*n*) ILLEGIBLE

(*o*) ILLEGIBLE

(*o*1) ILLEGIBLE

In one case (p) where a transfer of shares contained no impression but a place for a seal, though the attestation clause stated that it had been "signed, sealed and delivered", North, J., refused to assume that the document had been sealed; but the document was inoperative for another reason.

Nowadays a wafer with a design on it is frequently used. It is a question of fact as to whether a deed was or was not sealed by a particular person (*q*).

This indulgence in the matter of sealing does not extend to companies, building societies or industrial and provident societies. Their deeds must be executed in accordance with their articles of association and be sealed with a formal engraved seal. Where a seal had never been affixed and an attesting witness was not called, the Court held that it could not presume sealing (*r*).

Delivery.—This is an essential element in a deed, which takes effect not from its date but from its delivery. "After a deed is written and sealed, if it be not delivered, all the rest is to no purpose" (Termes de la Lay). "Where a contract is to be by deed, there must be delivery to perfect it" (*s*). Delivery signified the handing over of something, for instance, land or an intangible interest in

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(*p*) *Re Balkis Consolidated, Ltd.*(1888) 196 W. R. 392

(*q*) *National Provincial Bank v. Jackson* (1886) 33 Ch. D. 1, at p. 11

(*r*) *Re Smith* (1892) 67 L. T. 64

(*s*) *Xenos v. Wickham* (1863) ILLEGIBLE 495 at p. 473, *per.* Martin B.

it, which could not be physically transferred by hand as a chattel could be.

The ordinary form of words used is "I deliver this as my act and deed", but there need be no words. Any act of the party which shows that he intended to deliver the deed as an instrument binding him is enough. He must make it his deed (*t*) and recognize it as presently binding on him.

Delivery is non the less complete and effective because the grantor retains the deed in his own possession, so that it was early recognized that the deed need not be actually delivered to the other party to the deed.

"The efficacy of a deed depends on the being sealed and delivered by the maker of it, not on his ceasing to retain possession of it" (*u*). "Was it essential that the deed should be given out of the defendant's possession in order to perfect delivery as an operative instrument? I know of no such necessity in law or good sense" (*a*).

Corporations.—It has been much discussed as to whether delivery of deeds by corporations ILLEGIBLE the sealing in that case is equivalent to delivery (*b*). The better opinion seems to be that though sealing *prima facie* imports delivery, yet if it be intended otherwise it is

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(t) *Tupper v. Foulker* (1861) ILLEGIBLE

(*u*) *Xenos v. Wickham, supra, per* Lord Cranworth, at p. 323

(*a*) *Ibid., per* Pigott, B. at p. 309

(b) Are the discussion of the ILLEGIBLE in Norton (2nd ed.), pp. 11-13

not so (c). In the case of debentures it was said by Cotton, L.J., that they must be delivered before they can be binding on the company. "The fact of their being dated and sealed does not show that they were delivered (d). The old law requirement delivery to be made by a corporation at a corporate meeting, but in modern time sit has long been the practice for directors of joint stock and trading companies to execute deeds on behalf of their companies without calling a meeting of the company which would include the shareholders, for otherwise, the business of these companies could not be carried on. The authority for this is the statutory force given to the articles of association of joint stock companies by the Companies Act, 1948, ss. 8, 20, for it is the articles which should prescribe the necessary formalities of or the deeds of the company in question.

Escrow.—This is a limitation or condition on the delivery and therefore on the effect of a deed. The delivery is made subject to a condition or the happening of some event; in fact, the document is not an operative deed if it has such a contingency attached to it until such time as the contingency is resolved, *i.e.*, the condition is fulfilled or the event takes place.

"The maker [of a deed] may so deliver it as to suspend or nullify its binding effect. He may declare that it shall have no effect until a certain time has arrived or till some condition has been preformed, but when the time has arrived or the condition has been performed, the delivery becomes absolute and the maker of the deed is absolutely bound by it, whether he has parted with possession or not. Until the specified time has arrived or

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(c) ILLEGIBLE

(d) ILLEGIBLE

the condition has been performed, the instrument is not a deed. It is a mere ILLEGIBLE (e)".

Sheppard (Touch 59) mentions two forms of escrow; (a) where the deed is delivered to a third party to be delivered to the grantee on the fulfillment of the condition, thus necessitating a second delivery by the third party to the grantee, and (b) where the deed is delivered to the grantee directly but made subject to a condition, in this case the is, of course, no necessity for a second delivery and the deed takes effect as soon as the condition is fulfilled or the event happens. Sheppard is of opinion that the latter man not be a safe procedure and suggests that the first is the only effective way to constitute an escrow, declaring also that apt words must be used, *i.e.*, the instrument must be distinctly delivered to the third party as an escrow.

The modern law is that no express words are necessary; "It was not necessary that any express words should be used at the time. The conclusion was to be drawn from all the circumstances" (f). "It is quite settled that it is not necessary in delivering an instrument as an escrow to say that it is delivered as an escrow" (g). Evidence is admissible "to show the character in which and the terms upon which the deed was delivered" (h).

(e) ILLEGIBLE

(f) *Murray v. Earl of Stair* (1823) 2 B. & C. 82, at p. 88, *per* Abbott, C.J.

(g) *Nash v. Flynn* (1844) 1 Jo. & Lat. ILLEGIBLE, at p. 175, *per* Lord Sugden, L.C.; see also *Watkins v. Nash* (1875) L.R. 20 Eq. 262, at p. 266

(h) *London Freehold and Leasehold Property Co. v. Suffield* [1897] 2 ch. 608, at p. 621, *per* Lindley, L.J.

It is thus a question of intention, and "though it is in form an absolute delivery if it can be reasonably inferred (from the evidence) that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow" (i). Evidence is admissible of circumstances before the delivery is, of course, relevant evidence (k). If a grantee is in possession of a deed which had been delivered to a third person as an escrow (see *supra*) it is cogent *prima facie* evidence that the matter on which the delivery was made contingent has been performed or fulfilled (l). When once the condition has been fulfilled no further delivery is necessary and the deed takes effect automatically. Thus the first of Sheppard's propositions—that the deed was to be delivered to a stranger—is no longer necessary, and a conveyance may be held to be escrow, *e.g.*, till the purchase-money is paid (m) without any delivery to a third party. As stated above, it is a question of the intention with which the deed was delivered. An escrow cannot be delivered to take effect at the death of the grantor, for that is necessarily testamentary and is in fact a will, which is governed by other considerations (n).

(i) *Bowkes v. Burdskin* (1849) 11 M. & W. 128, at p. 147, *per* Parke, B., *Govenors, etc., of Soundling Hospital v. Crane* [1911] ILLEGIBLE K. B. 967, *Thopson v. McCullogh* [1947] K. H. 447, 452, *per* Morton, L.J., following *Bowkir v. Hurdekin, supra.*

(k) *Davis v. Jones (1856) 17 C. B. 625, at p. 634*

(l) *Hare v. Horton* (1839) 5 ILLEGIBLE

(m) ILLEGIBLE

(n) ILLEGIBLE

Execution on faith of others excecuting.—In *Luke v. South Kensington Hotel Company* (o), Sir George Jessel, M.R., held that if two persons execute a deed on the faith that a third party will also do so, and that is known to the other parties to the deed, the latter does not bind in equity if the third party refuses to execute. This has recently been said by the House of Lords, to have been expressed far too widely (p). In that case a deed of settlement in favour of Lady Naas which recited that it was made by the settlor, Lady Naas and the Westminster Bank, and was signed, sealed and delivered unconditionally by the settlor, was never in fact executed by Lady Naas although she was ready and willing to do so. The House of Lords held that once the settlor had signed, sealed and delivered the deed unconditionally, the trusts for Lady Naas and others were duly constituted.

Referring to the statement of the law by Sir George Jessel (*supra*), Lord Russell of Killowen said (q) "I do not think the proposition can be carried further than this, that the equity arises where a deed is sought to be enforced against an executing party and owing to the non-execution by...

(o) ILLEGIBLE

(p) ILLEGIBLE

(q) ILLEGIBLE